TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted] 218

JENNIE LATHROP RAND, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 23, 1917.

(26,011)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 544.

JENNIE LATHROP RAND, APPELLANT,

vs.

THE UNITED STATES.

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1 I. *Petition and Exhibits A, B, and C.*

Filed October 22, 1914.

In the Court of Claims of the United States.

No. 32970.

JENNIE LATHROP RAND

v.

THE UNITED STATES.

Petition.

(Filed October 22, 1914.)

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioner, Jennie Lathrop Rand, respectfully represents:

I.

That on June 13, 1898, the President of the United States approved an act entitled "An act to provide ways and means to meet war expenditures and for other purposes" (30 Stat., 448, 464-5), by section 29 of which legacies and distributive shares arising
2 from personal property became subject to a tax. The portions of said section 29 material to this case are as follows:

"Section 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say:

"Where the whole amount of said personal property shall exceed

* * * * * * *

in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

"Fifth. Where the person or persons entitled to any beneficial interest in such property shall be * * * a stranger in blood to the person who died possessed, as aforesaid, * * * at the rate of five dollars for each and every hundred dollars of the clear value of such interest:

* * * * * * *

"Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; * * *."

II.

That section 31 (30 Stat., 448, 466) of said Act of June 13, 1898, entitled as aforesaid, was, in full, as follows:

3 "Section 31. That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed are hereby made applicable to this Act."

III.

That Section 3182 of the Revised Statutes of the United States provides, in part, as follows:

"The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this Title, or accruing under any former internal-revenue act, where such taxes have not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified. * * * And all provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings herein authorized and directed."

IV.

That on April 12, 1902, the President of the United States approved an act entitled "An act to repeal war revenue taxation, and for other purposes" (32 Stat., 96), by which said section 29 of the said act of June 13, 1898, was repealed, said repeal to take effect on July 1, 1902. The portions of said act of April 12, 1902, material to this case are as follows:

"Section 7. That section * * * twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and all amendments * * * be, and the same are hereby, repealed.

"Section 8. That all taxes or duties imposed by section twenty-nine of the Act of June thirteenth, eighteen hundred and
4 ninety-eight, and amendments thereof, prior to the taking effect of this Act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows: * * *

* * * * * * *

"Section 11. That this Act, except as otherwise specially provided for in the preceding section, shall take effect July first, nineteen hundred and two."

V.

That on July 27, 1912, the President of the United States approved an act entitled "An act extending the time for the repayment of certain war-revenue taxes erroneously collected" (37 Stat., 240), which is material in this case and reads as follows:

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act may be presented to the commissioner of internal revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

"Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the act aforesaid."

5 That on or about December 16, 1898, the Commissioner of Internal Revenue of the United States, claiming to act in pursuance of authority to him granted by sections 29, 30 and 31 of the Act of Congress of June 13, 1898, (30 Stat., 448) issued, promulgated and proclaimed a certain pretended rule or regulation, designated and known as "Series 7, No. 3—Revised Supplement No. 1," to be found printed in the official publication entitled, "Compilations of Decisions rendered by the Commissioner of Internal Revenue under the War Revenue Act of June 13, 1898," (at pages 195 to 199, thereof) printed in 1899 at the Government Printing Office in the City of Washington, District of Columbia, which said pretended rule or regulation, is, in words and figures, as follows, to-wit:

"Treasury Department,

"Office of Commissioner of Internal Revenue,

"Washington, D. C.,

"December 16, 1898.

"The appended tables, showing the present worth of an annuity, life interest, and of a reversionary interest, with explanatory notes and examples, are hereby published and promulgated for the use of internal-revenue officers and administrators, executors, or trustees in determining the duty or tax to be paid to the United States upon legacies or distributive shares arising from personal property, imposed by the act of June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes.'

"N. B. SCOTT,
"*Commissioner.*

"Approved:
"O. L. SPAULDING,
"*Acting Secretary of the Treasury.*

6 "*Legacy Taxes—Table, single life, 4 per cent, showing the present worth of an annuity or life interest, and of a reversionary interest, with explanatory notes and examples.*

"(United States Internal-revenue Adjustment, 1898.)

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
10	38.891	$19.45359	$0.21332
11	38.507	19.36943	.21656
12	38.113	19.28184	.21996
13	37.710	19.19065	.22344
14	37.298	19.09590	.22708
15	36.877	18.99764	.23086
16	36.447	18.89569	.23478
17	36.010	18.79010	.23884
18	35.565	18.68070	.24305
19	35.113	18.56751	.24746
20	34.652	18.45038	.25191
21	34.186	18.32932	.25656
22	33.711	18.20416	.26138
23	33.230	18.07471	.26636
24	32.742	17.94097	.27150
25	32.248	17.80274	.27682
26	31.747	17.65984	.28231
27	31.239	17.51224	.28799
28	30.725	17.35968	.29386
29	30.205	17.20225	.29991
30	29.678	17.03961	.30617
31	29.147	16.87176	.31262
32	28.608	16.69846	.31929
33	28.067	16.51964	.32617
34	27.516	16.33503	.33327
35	26.961	16.14437	.34060
36	26.401	15.94755	.34817
37	25.834	15.74427	.35599
38	25.263	15.53421	.36467
39	24.685	15.31722	.37241
40	24.101	15.09295	.38104
41	23.511	14.86102	.38996
42	22.915	14.62122	.39918
43	22.313	14.37356	.40871
44	21.708	14.11860	.41852

7 "*Legacy Taxes—Table, single life, 4 per cent, showing the present worth of an annuity or life interest, and of a reversionary interest, with explanatory notes and examples.*

"(United States Internal-revenue Adjustment, 1898.)

"(Continued.)

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
45	21.103	$13.85713	$0.42857
46	20.499	13.58958	.43886
47	19.896	13.21698	.44935
48	19.298	13.03942	.46002
49	18.703	12.75716	.47088
50	18.113	12.47032	.48191
51	17.527	12.17919	.49311
52	16.947	11.88408	.50446
53	16.372	11.58531	.51595
54	15.804	11.28325	.52757
55	15.243	10.99789	.53931
56	14.689	10.66982	.55116
57	14.143	10.35931	.56310
58	13.603	10.04630	.57514
59	13.072	9.73131	.58726
60	12.549	9.41474	.59943
61	12.029	9.09765	.61163
62	11.532	8.78052	.62382
63	11.039	8.46412	.63690
64	10.557	8.14888	.64812
65	10.088	7.83552	.66017
66	9.630	7.52476	.67212
67	9.185	7.21699	.68396
68	8.753	6.91298	.69565
69	8.333	6.61301	.70719
70	7.926	6.31716	.71857
71	7.532	6.02612	.72976
72	7.151	5.74003	.74077
73	6.782	5.45928	.75157
74	6.425	5.18402	.76215
75	6.081	4.91463	.77251
76	5.749	4.65125	.78264
77	5.428	4.39383	.79254
78	5.119	4.14286	.80220

8 "*Legacy Taxes—Table, single life, 4 per cent, showing the present worth of an annuity or life interest, and of a reversionary interest, with explanatory notes and examples.*

"(United States Internal-revenue Adjustment, 1898.)

"(Continued.)

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
79	4.823	$3.89858	$0.81159
80	4.537	3.66071	.82074
81	4.262	3.42900	.82965
82	3.995	3.20258	.83836
83	3.737	2.98024	.84691
84	3.484	2.76106	.85534
85	3.236	2.54366	.86371
86	2.992	2.32795	.87200
87	2.752	2.11384	.88024
88	2.517	1.90115	.88842
89	2.286	1.69107	.89650
90	2.062	1.48540	.90441
91	1.845	1.28432	.91214
92	1.637	1.09024	.91961
93	1.442	.90647	.92667
94	1.263	.73687	.93320
95	1.103	.58435	.93906
96	.975	.46182	.94378
97	.877	.36698	.94742
98	.746	.24038	.95229
99	.500	.00000	.96154

"Example 1.—A person dying bequeaths to his nephew, aged 40 years, an annuity of one thousand dollars during life. What is the present value of the annuity?

"Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged 40 years, is fifteen dollars nine cents two mills and ninety-five one-hundredths of a mill ($15.09295); therefore the present value of one thousand dollars is one thousand times as much, or fifteen thousand and ninety-two dollars and ninety-five cents, the amount upon which tax accrues.

9 "Example 2.—A person dying bequeaths to his daughter, aged 35 years, a life interest in personal property amounting to fifty thousand dollars ($50,000), the estate to revert absolutely at her death to other parties. Required the present value, at the date

of death of the testator, of the life interest of the daughter in the estate; also, required at the same date, the present value of the reversionary interest of said other parties in the estate.

"At a net interest of 4 per cent per annum, the assumed rate, the estate of $50,000 will realize an income or annuity of $2,000 per annum. The present value of the sum of $1, payable at the end of each year during the life of a person aged 35 years, is found by the table to be $16.14437, and the present value of an annuity of $2,000 for the same time would be two thousand times as much, or $32,288.74, the amount upon which tax accrues.

"The reversion or present value of $1, due at the end of the year of death of a person aged 35 years, is found by the table to be $0.34060, and such value of $50,000 would be fifty thousand times as much, or $17,030, the amount upon which tax accrues.

"NOTE.—This table is based on the 'Actuaries' or Combined Experience Table,' money being worth 4 per cent per annum.

"The first column shows the age of the person under consideration.

"The second column shows the corresponding 'mean redemption period,' and represents the time in years in which the present values of annuities and reversions certain will become equal respectively to the present value of annuities and reversions contingent on the duration of life.

"The 'mean redemption period,' is a mean between the last payment of the annuity and the payment of the reversion, averaging six months later than the former payment and six months earlier than the latter payment.

"The third column shows the present value of an annuity for life of one dollar per annum, the last payment being made at the end of the year prior to the one in which death occurs.

"The fourth column shows the present worth of one dollar payable at the end of the year in which death occurs.

"NOTE.—This adjustment has been prepared under the direction of Mr. J. S. McCoy, Government actuary.

"Present Value of Annuities and Reversions Certain Upon a 4 Per Cent Basis.

Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.
	Annuity.	Reversion.
1	$0.96154	$0.961538
2	1.88609	.924556
3	2.77509	.888996
4	3.62989	.854804
5	4.45182	.821927
6	5.24214	.790314
7	6.00205	.759918
8	6.73274	.730690
9	7.43533	.702587
10	8.11089	.675564
11	8.76047	.649581
12	9.38507	.624597
13	9.98565	.600574
14	10.56312	.577475
15	11.11839	.555265
16	11.65229	.533908
17	12.16567	.513373
18	12.65929	.493628
19	13.13394	.474642
20	13.59032	.456387
21	14.02916	.438834
22	14.45111	.421955
23	14.85684	.405726
24	15.24696	.390121
25	15.62208	.375117
26	15.98277	.360689
27	16.32958	.346816
28	16.66306	.333477
29	16.98371	.320651
30	17.29203	.308319

11 "Example.—A man dies leaving personal property to the amount of $50,000, his daughter to have the income from it for twenty years, it then to revert to his youngest son. What is the present worth of these legacies?

"The income from $50,000 would be $2,000 per annum, assuming money at 4 per cent.

"The present worth of an annuity of $2,000 for twenty years will be 2,000 times an annuity of $1 for twenty years. In the table, opposite 20, we find the value of an annuity of $1 to be $13.59032;

therefore the present worth of an annuity of $2,000 will be $27,180.64.

"A reversion of $1 at the end of twenty years is shown by the table to be $0.456387, and a reversion of $50,000 will be 50,000 times as much, or $22,819.35."

VII.

That on June 6, 1900, Edmund Dwight, a citizen of the United States and of the State of Massachusetts, and a resident of the city of Boston, in the said State, departed this life, leaving a valid last will and testament, which said last will and testament was thereafter, to wit, on or about June 28, 1900, duly admitted to probate and record by a court of competent jurisdiction in the city of Boston and the County of Suffolk, in the State of Massachusetts, and letters testamentary were, by order of said court, duly issued to Elizabeth Cabot, who was therein named as executrix, she having accepted said trust, and that said Elizabeth Cabot acted as executrix in all the matters hereinafter set forth, except the matters set forth in paragraph XI herein, and that said Elizabeth Cabot has since deceased. That subsequent to the decease of the said Elizabeth Cabot, Philip Cabot was appointed administrator, with the will annexed, of the estate not already administered and acted as such administrator in the matter set forth in paragraph XI herein. A certified copy of the said last will and testament is herewith filed, marked "Petitioner's Exhibit A"; a certified copy of said letters testamentary issued to said Elizabeth Cabot as executrix is herewith filed, marked "Petitioner's Exhibit B," and a certified copy of letters testamentary issued to Philip Cabot as administrator is herewith filed, marked "Petitioner's Exhibit C." All of these petitioner's exhibits are prayed to be read and considered as a part of this petition. That a portion of said last will, material to this case, reads as follows:

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"I give to the New England Trust Company, a corporation duly chartered by the State of Massachusetts, and located in the City of Boston, the sum of One hundred and twenty-five thousand dollars ($125,000) to be invested in the General Trust Fund of the company, and held upon the following trusts:

"To pay to Mrs. Jennie Lathrop Rand, now living at forty-nine Kirkland Street Cambridge the annual net income thereof in semi-annual payments during her life; after her death to pay said annual net income to such one or more of her three children Margaret Arnold, Henry Lathrop and Edward Lathrop, as shall survive her, and as she shall appoint by her last will or by other instrument in writing signed by her and attested by three witnesses. By the said appointment the said Jennie may dispose of the said annual net income among her said surviving children in such manner and proportions as she shall deem best; but she shall have no power to appoint any part of said annual net income to any such child for a term longer than the life of such child. In default of such appointment or at my death, if the said Jennie should die before me, the said annual net income shall be paid in equal shares to the said Margaret and Henry so long as they both shall live; on the death of

either of them, or if, on the death of the said Jennie, or at my death after the death of the said Jennie, only one of them be living, then to the survivor during his or her life; on the death of the survivor, or if on the death of the said Jennie or at my death after the death of the said Jennie, both said Margaret and Henry be de-
13 ceased, then to the said Edward for his life—I desire that any of the income of the fund hereinbefore given which may be paid to the said Margaret shall be paid to her for her sole and separate use, free from the interference or control of any husband she may marry.

"After the death of the last survivor of the said Jennie, Margaret, Henry and Edward, I direct that said fund be paid to the President and Fellows of Harvard College to be used by them principal and interest, as they shall think best for the benefit of the University and this Trust shall then terminate."

VIII.

That subsequent to the death of the said Edmund Dwight, deceased, and not later than September 28, 1900, the Commissioner of Internal Revenue certified to the Collector of Internal Revenue for the Third District of Massachusetts that he, the said Commissioner of Internal Revenue, had assessed against the estate of the said decedent, and on account of the interest in said estate of the Petitioner to her given by the paragraphs of the will of said decedent which are set forth in full in paragraph VII in this Petition, and in accordance with Sections 29 and 31 of said Act of June 13, 1898, and amendments, a tax, in the sum of Three Thousand and Twenty-six and 69/100 Dollars ($3,026.69). Whereupon said Collector of Internal Revenue for the Third District of Massachusetts proceeded to demand and collect and did collect from said Elizabeth Cabot, Executrix, the full sum of said pretended tax, that is to say, Three Thousand and Twenty-six and 69/100 Dollars ($3,026.69) which sum said Elizabeth Cabot, Executrix, did pay to said Collector, on or about September 28, 1900. That the sum of Three Thousand and Twenty-six and 69/100 Dollars ($3,026.69) paid, as aforesaid, to said Collector, was provided by the Petitioner and at her sole cost and charge. That the whole of said sum was duly turned over to the United States by the said Collector of Internal Revenue in the usual course of his business as Collector.

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IX.

That said Commissioner of Internal Revenue never made any lawful assessment of any tax, in accordance with Sections 29 and 31 of said Act of June 13, 1898, and amendments, on account of the interest of the Petitioner in the estate of the said Edmund Dwight, deceased. That, disregarding the facts conditioning and determining the actual or clear value of the interest of the Petitioner, the amount of said pretended assessment was arbitrarily determined in accordance with the pretended general rule or regulation fully set

forth in paragraph VI in this Petition and substantially in the manner following, to wit:

1. It was assumed, as required by said pretended general rule or regulation, that the trust fund provided for by the said paragraphs of the said will of Edmund Dwight, deceased, was established immediately upon the death of the said testator, and that the income therefrom commenced immediately, that is to say on or about June 6, 1900, to accrue to and for the use and benefit of the Petitioner.

2. It was assumed, as further required by said pretended general rule or regulation, that the said trust fund would produce an annual income amounting to four (4) per centum of the full amount thereof, that is to say, that, as the amount of the said trust fund was One Hundred and Twenty-Five Thousand Dollars ($125,000.00), it was assumed that an annual income of Five Thousand Dollars ($5,000.00) would accrue therefrom to the use and benefit of the Petitioner.

3. It was assumed, as still further required by said pretended general rule or regulation, that the whole income thereafter to accrue to the use and benefit of the Petitioner, on account of and from the said trust fund, during the whole period of her life, was discountable for cash on June 6, 1900, at the discount rate of four (4) per centum per annum for all future payments and on the basis of the
15 expectancy of life of persons of Petitioner's age, on said June 6, 1900, as indicated by the selected mortuary tables adopted by the said Commissioner of Internal Revenue.

4. Relying upon the foregoing assumptions, and as the Petitioner was Sixty-three (63) years of age on June 6, 1900, the said Commissioner of Internal Revenue multiplied the present worth of the right of a person of said age to receive the sum of One Dollar ($1.00) at the end of each year during life, as shown (on the basis of said assumed discount rate of four per centum per annum and the expectancy of life therein estimated) in the tables constituting a part of said pretended general rule or regulation, that is to say, the sum of Eight and 46,412-100,000 Dollars ($8.46 412/1000) by Five Thousand (5,000) and obtained, as the product, the sum of Forty-Two Thousand, Three Hundred and Twenty and 60/100 Dollars ($42,320.60). Deducting from the said product the amount of a tax collected by the State of Massachusetts, that is to say, the sum of One Thousand, Nine Hundred and Sixty-Four and 69/100 Dollars ($1,964.69), the said Commissioner of Internal Revenue obtained Forty Thousand, Three Hundred and Fifty-Five and 91/100 Dollars ($40,355.91) which said Commissioner, thereupon, assumed to be the clear value of the aforesaid interest of the Petitioner to her given, as aforesaid, by the said Edmund Dwight, deceased.

5. Applying to Forty Thousand, Three Hundred and Fifty-Five and 91/100 Dollars ($40,355.91), obtained as aforesaid, the rate of Seven and 50/100 Dollars ($7.50) per One Hundred Dollars ($100.00) the said Commissioner of Internal Revenue obtained the sum of Three Thousand and Twenty-Six and 69/100 Dollars ($3,026.69), as aforesaid, which said Commissioner, thereafter, certified to the said Collector of Internal Revenue for the Third District of

Massachusetts as the amount of the said pretended tax which he claimed to have assessed against the said interest of the Petitioner.

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X.

That the trust fund provided for by the said paragraphs of the said last will of the said Edmund Dwight, deceased, was established on October 1, 1900, by the payment on that date to the trustee, the New England Trust Company, by the said Elizabeth Cabot, Executrix, of the amount named in said will, and that prior to that date no income from or on account of said trust accrued to the use or benefit of the Petitioner or was received by her. That the whole income from said trust fund paid to or for the use of the Petitioner prior to July 1, 1902, amounted to Five Thousand and Seventy-Eight and 13/100 Dollars ($5,078.13) and that the whole income accruing therefrom to her use or benefit prior to said July 1, 1902 amounted to Seven Thousand, Four Hundred and Twenty-One and 88/100 Dollars ($7,421.88), including therein the amount paid as aforesaid, or at the rate of Three Hundred and Fifty-Three and 42/100 Dollars ($353.42) per month or Four Thousand, Two Hundred and Forty-One and 07/100 Dollars ($4,241.07) per annum. That the income of said trust fund paid or accruing to or for the use or benefit of the Petitioner has not in fact, regularly or upon the average, amounted to as much as Five Thousand Dollars ($5,000.00) or four (4) per centum per annum but has, during nearly all the period since the trust was established, been less than that annual amount and rate, that is to say, from the establishment of said trust fund on October 1, 1900, to July 1, 1911, the annual rate of income credited thereon by the said New England Trust Company, Trustee, never exceeded three and three-quarters (3¾) per centum per annum and for the years 1905 to 1909, inclusive, the income credited, as aforesaid, was at the rate of three and one-half (3½) per centum per annum. That the then future payments provided for by said trust were not, at any time during the year 1900, or thereafter, discountable at the rate of four (4) per centum per annum or on the basis or for the sums as-

17 sumed by said Commissioner of Internal Revenue in said pretended assessment. That the interest of the Petitioner, as aforesaid, did not have, at any time during the year 1900, and has not thereafter had, an actual or clear value of as much as Forty Thousand, Three Hundred and Fifty-Five and 91/100 Dollars ($40,355.81).

XI.

That subsequent to the payment of said pretended tax, as aforesaid, and within the period provided by statute, appeal and claim was duly made to the Commissioner of Internal Revenue, and it was represented to said Commissioner that the collection of said sum of Three Thousand and Twenty-Six and 69/100 Dollars ($3,026.69) and of each and every part thereof was unlawful and that the whole amount thereof should be refunded. During or about the month of March,

in the year 1914, the said Commissioner of Internal Revenue did disallow and reject the claim for the refund of the amount of Three Thousand and Twenty-Six and 69/100 Dollars ($3,026.69) and the whole of said pretended tax, as aforesaid, is now retained and held by the United States.

XII.

Petitioner is advised by counsel and therefore avers:

First. That no tax was imposed, under the Act of June 13, 1898, and amendments, repealed by the Act of April 12, 1902, upon the interest of the Petitioner in the estate of Edmund Dwight, deceased.

Second. That the said Commissioner of Internal Revenue had no power to make or to enforce the said pretended general rule or regulation as set forth in paragraph VI of this Petition or to adopt or to use a general rate of discount or of interest in the assessment of taxes under said Section 29 of said Act of June 13, 1898, and amendments,
and that the pretended assessment made in accordance with
18 said pretended general rule or regulation was erroneous and illegal, within the meaning of the Act of July 27, 1912.

Third. That if any obligation or liability for any tax under said Act of June 13, 1898, and amendments, attached to the said interest of the Petitioner the obligation or liability was for a smaller amount than the said Three Thousand and Twenty-Six and 69/100 Dollars ($3,026.69).

Fourth. That the Act of July 27, 1912, contained an appropriation out of the Treasury of the United States of the funds necessary to repay to the Petitioner the said sum of Three Thousand and Twenty-Six and 69/100 Dollars ($3,026.69) so illegally assessed, collected and held by the United States, or any part thereof that may be held to have been erroneously or illegally assessed or collected, and authorized and directed the Secretary of the Treasury to make such repayment.

XIII.

Petitioner is advised by counsel and therefore avers that the whole of the said sum of Three Thousand and Twenty-Six and 69/100 Dollars ($3,026.69), demanded and paid as aforesaid, was unlawfully collected and should now be refunded.

XIV.

Wherefore your petitioner avers that there is justly owing to her, from the United States, on account of the matters herein set forth, the sum of Three Thousand and Twenty-Six and 69/100 Dollars ($3,026.69), after deducting all just set-offs and demands on the part of the United States, and she further avers that she is the sole owner of the claim herein sued upon, and that no transfer or assignment of said claim or any part thereof or interest therein has ever been made; that she is a citizen of the United States and of the State of Massachusetts and a resident of the City of Boston in said State, and

has at all times borne true allegiance to the Government of
19 the United States, and has not in any way voluntarily aided, abetted or given encouragement to a rebellion against the United States, and that she believes the averments in this petition to be true.

The premises considered, petitioner prays:

Prayers.

1. That this Honorable Court will render judgment against the United States for the said sum of Three Thousand and Twenty-Six and 69/100 Dollars ($3,026.69) in favor of the Petitioner.
2. That Petitioner may have such other and further relief as the nature of the case may require and to this Honorable Court may seem meet and proper.

JENNIE LATHROP RAND.
By MORRIS F. FREY,
Attorney for Petitioner.

NEWCOMB & FREY,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public in and for the District of Columbia, Morris F. Frey, who, being duly sworn according to law, deposes and says that he has been duly authorized to make oath in this cause, by power of attorney heretofore filed herein,
20 that he has read and understands the foregoing petition, and that the matters and facts therein set forth are true in substance and in fact, as he is informed and believes.

MORRIS F. FREY.

Subscribed and sworn to before me this 22nd day of October, A. D. 1914.

[NOTARIAL SEAL.] MARY E. PETER,
Notary Public.

21 PETITIONER'S EXHIBITS A, B, AND C.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Registry of Probate.

I, Arthur W. Dolan, Register of the Probate Court for said County of Suffolk, having by law the custody of the seal and all the records, books, documents, and papers of or appertaining to said Court, hereby certify the papers hereto annexed to be true copies of papers appertaining to said Court, and on file and of record in the office of said Court, to wit:—The last will and testament of Edmund Dwight

late of Boston in said County of Suffolk, deceased, the decree of said Court admitting said will to probate, and the petition, citation, decree, bond and Letter relating to the appointment of Philip Cabot as administrator with the will annexed of the estate not already administered of said deceased. And I further certify that the proof of said will in said Court, was by oral testimony only, and that there are no proofs or substance of proofs on file or of record in said Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this ninth day of September in the year of our Lord one thousand nine hundred and fourteen.

[SEAL.] ARTHUR W. DOLAN, *Register*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Probate Court.

I, Robert Grant, Esquire, First Judge of the Probate Court within and for the County of Suffolk, hereby certify that Arthur W. Dolan, Esquire, whose signature is affixed to the annexed certificates and attestation, is the Register and proper Certifying Officer of said Court, and has, by law, the custody of the seal, and all the Records, books, documents and papers of, or appertaining to said Court, and that said certificates and attestation are in due form and entitled to full faith and credit.

22 In Witness Whereof, I have hereunto set my hand, this ninth day of September in the year of our Lord one thousand nine hundred and fourteen.

ROBERT GRANT,
Judge of Probate Court.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Registry of Probate.

I, Arthur W. Dolan, Esquire, Register of the Probate Court within and for the County of Suffolk, hereby certify that Robert Grant, Esquire, whose signature is affixed to the annexed Certificate, is the First Judge of said Court, duly commissioned and qualified, and that his said certificate is in due form, and entitled to full faith and credit.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, this ninth day of September in the year of our Lord one thousand nine hundred and fourteen.

[SEAL.] ARTHUR W. DOLAN, *Register.*

I, Edmund Dwight of Boston Massachusetts, make this my last will and Testament, hereby revoking all Wills by me at any time heretofore made.

I give to the Boston Museum of Fine Arts two pictures by William M. Hunt called "The Hurdy Gurdy Boy" and "The Girl with Kitten"; also a landscape by Washington Allston.

I give to my sister Elizabeth Cabot, wife of James Elliot Cabot, if she be living at my death, any pictures or works of art or pieces of silver or furniture which she may select, other than the three above mentioned.

I give all household and personal effects received by my late wife from her father or other member of her family, to the oldest male descendant of her father living at my death, requesting, but not requiring, such person to distribute the same among the members of the family as he or she may think advisable. A memorandum describing the articles referred to will be found among my papers at my death, but is not to be part of this will.

With the foregoing exceptions, I give to my said sister Elizabeth Cabot all my furniture, books, silver, pictures, marbles, bronzes, horses, carriages, harnesses, all household and personal effects of all
23 kinds, requesting, but not requiring, her to distribute the same in accordance with memoranda which will be found among my papers at my death.

I give and appoint my share of the property conveyed to Trustees under the will of my mother Mary Harrison Dwight, and over which I have power of disposition, in equal shares to my niece Ellen Twisleton Vaughan, wife of William W. Vaughan, and to my nephew, Henry Parkman, the issue living at my death of either of them then deceased to take the ancestor's share by right of representation. If either of them be then dead leaving no issue then living. I give and appoint his or her share to the other, or to the issue of the other as aforesaid. If they both be then dead leaving no issue then living, I give and appoint the said property to the issue then living of my said sister Elizabeth Cabot per stirpes, the issue of a deceased child standing in his place and taking by right of representation.

I give to the New England Trust Company, a corporation duly chartered by the State of Massachusetts, and located in the City of Boston, the sum of One hundred and twenty-five thousand dollars ($125,000) to be invested in the General Trust Fund of the company, and held upon the following trusts:

To pay to Mrs. Jennie Lathrop Rand, now living at forty-nine Kirkland Street Cambridge the annual net income thereof in semi-annual payments during her life; after her death to pay said annual net income to such one or more of her three children Margaret Arnold, Henry Lathrop and Edward Lathrop, as shall survive her, and as she shall appoint by her last will or by other instrument in writing signed by her and attested by three witnesses. By the said appointment the said Jennie may dispose of the said annual net income among her said surviving children in such manner and proportions as she shall deem best: but she shall have no power to appoint any part of said annual net income to any such child for a term longer

than the life of such child. In default of such appointment or at my death if the said Jennie should die before me, the said annual net income shall be paid in equal shares to the said Margaret and Henry so long as they both shall live; on the death of either of them, or if, on the death of the said Jennie or at my death after the death of the said Jennie, only one of them be living, then to the survivor during his or her life; on the death of the survivor, or if on the death of the said Jennie or at my death after the death of the said Jennie, both said Margaret and Henry be deceased, then to the said Edward for his life—I desire that any of the income of the fund hereinbefore given which may be paid to the said Margaret shall be paid to her for her sole and separate use, free from the interference or control of any husband she may marry.

After the death of the last survivor of the said Jennie, Margaret, Henry and Edward, I direct that said fund be paid to the President and Fellows of Harvard College to be used by them principal and interest, as they shall think best for the benefit of the University and this Trust shall then terminate I hereby request but do not require the said President and Fellows to add so much of the fund as they shall consider proper to the Eliot fund for the Greek professorship, stating in the event of such addition to the Eliot fund that it is made by a grandson of the founder. I would suggest that the sum added, together with the amount of the Eliot fund then existing might be sufficient to pay the salary of the Eliot professor of Greek Literature.

I give my nephew Arthur Mills, if he be living at my death, Five hundred dollars ($500) and a like amount to each one of my nephews, sons of James Elliot Cabot and of my said sister Elizabeth Cabot, who shall be living at my death, these gifts as a token of remembrance.

All the rest, residue and remainder of my property, real and personal, which I may possess, or over which I may have power of disposition, I give to my said sister Elizabeth Cabot if she survive me, requesting but not requiring her to distribute the same in accordance with a memorandum which will be found among my papers at my death, but if she do not survive me, I give the same to my said niece Ellen Twisleton Vaughan with the same request; and if neither my said sister Elizabeth, nor my said niece Ellen survive me, I give the same to my nephew Philip Cabot with the same request.

I hereby nominate and appoint as executrix of this Will my said sister Elizabeth Cabot, and I request that she be excused from giving any surety or sureties on her probate bond; and I fix the compensation which she shall receive as executrix at one thousand dollars ($1,000); said sum to take the place of the compensation allowed by law.

In testimony whereof I hereunto set my hand and seal and in the presence of three witnesses declare this to be my last Will this ninth day of June eighteen hundred and ninety-nine.

[SEAL.] EDMUND DWIGHT.

On this ninth day of June eighteen hundred and ninety-nine, Edmund Dwight, of Boston, Massachusetts, signed and sealed the foregoing instrument in our presence, declaring it to be his last will and as witnesses thereof we three do now at his request, in his presence and in the presence of each other hereto subscribe our names.

FRANK T. DWINELL,
50 State St., Boston.
WINTHROP TEWKSBURY,
50 State St., Boston.
PERLEY P. PILLSBURY,
50 State St., Boston.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

At a Probate Court Holden at Boston, in and for said County of Suffolk, on the twenty-eighth day of June in the Year of Our Lord One Thousand Nine Hundred.

On the petition of Elizabeth Cabot of Brookline in the County of Norfolk praying that the instrument therewith presented, purporting to be the last will and testament of Edmund Dwight late of Boston, in said County of Suffolk, deceased, may be proved and allowed, and letters testamentary issued to her, the executrix therein named; without giving a surety on her bond; and the heirs-at-law, next of kin and all other persons interested, having been notified according to the order of the Court, to appear and show cause, if any they have, against the same; and no party objecting thereto, and it appearing that said instrument is the last will and testament of said deceased, and was legally executed, and that said testator was, at the time of making the same, of full age and sound mind; and that said petitioner is a competent person to be appointed to said trust;

26 It is therefore decreed that said instrument be approved and allowed as the last will and testament of said deceased, and letters testamentary be issued to said petitioner, she first giving bond without sureties, for the due performance of said trust.

JOHN W. McKIM,
Judge of Probate Court.

To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Respectfully represents Philip Cabot of Boston in the County of Suffolk that the will of Edmund Dwight late of Boston, in said County of Suffolk, deceased, was duly proved and allowed on the 28th day of June A. D. 1900, in said Court, and that Elizabeth Cabot was appointed executrix thereof, and that said executrix has died without having fully executed said will and that your petitioner is the nephew of said Edmund Dwight and the son of said Elizabeth Cabot.

Wherefore your petitioner prays that he, or some other suitable

person, be appointed administrator with the will annexed of the estate of said deceased not already administered, and that he may be exempt from giving any surety on his bond, and certifies that the statements herein contained are true to the best of his knowledge and belief.

Dated this sixteenth day of January A. D. 1902.

PHILIP CABOT.

SUFFOLK, *ss:*

Subscribed and sworn to this sixteenth day of January A. D. 1902. Before me.

MOSES WILLIAMS, JR.,
Justice of the Peace.

The undersigned, being all the persons interested, hereby assent to the foregoing petition.

F. ELLIOT CABOT,
PHILIP CABOT,
Executors of the Will of Elizabeth Cabot.

27 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Probate Court.

To the devisees, legatees, and all other persons interested in the estate of Edmund Dwight, late of Boston, in said County, deceased, testate:

Whereas a petition has been presented to said Court to grant a letter of administration with the will annexed, on the estate of said deceased, not already administered, to Philip Cabot, of said Boston, without giving a surety on his official bond, or some other suitable person.

You are hereby cited to appear at a Probate Court to be held at Boston, in said County of Suffolk, on the thirtieth day of January, A. D. 1902, at ten o'clock in the forenoon, to show cause, if any you have, why the same should not be granted.

And said petitioner is hereby directed to give public notice thereof by publishing this citation once in each week, for three successive weeks, in the Boston Daily Advertiser, a newspaper published in said Boston, the last publication to be one day, at least, before said Court and by mailing postpaid or delivering a copy of this citation to all devisees and legatees named in said will seven days at least before said Court.

Witness, John W. McKim, Esquire, Judge of said Court, this sixteenth day of January in the year one thousand nine hundred and two.

ELIJAH GEORGE, *Register.*

I have served the foregoing citation as therein ordered by publication and mailing.

CHARLES WALCOTT.

SUFFOLK, *ss:*

Jan. 30, A. D. 1902.

Then personally appeared Charles Walcott and made oath that the above return by him subscribed is true.

Before me,

PAUL M. WHITE,
Justice of the Peace

28 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

At a Probate Court Holden at Boston, in and for said County of Suffolk, on the thirtieth day of January in the year of our Lord one thousand nine hundred and two.

On the petition of Philip Cabot of said Boston, praying that he, or some other suitable person, be appointed administrator with the will annexed, of the estate not already administered, of Edmund Dwight, late of said Boston, deceased, without giving a surety on his official bond, it appearing that the will of said deceased was duly proved and allowed, on the twenty-eighth day of June A. D. 1900, by said Court and that Elizabeth Cabot was appointed executrix thereof; and has since deceased without having fully executed said will. All persons interested having been notified according to the order of Court, and no person objecting thereto, and having assented

It is decreed that said petitioner be appointed administrator with the will annexed, of said estate not already administered, he first giving bond without sureties for the due performance of said trust.

JAMES H. FLINT,
Acting Judge of Probate Court.

Know All Men by These Presents,

That I, Philip Cabot of Boston in the County of Suffolk in the Commonwealth of Massachusetts, am holden and stand firmly bound and obliged unto John W. McKim, Esquire, Judge of the Probate Court in and for the County of Suffolk, in the full and just sum of four thousand dollars, to be paid to said Judge and his successors in said office; to the true payment whereof I bind myself and my heirs, executors and administrators, by these presents. Sealed with my seal, and dated the 27th day of January, in the year of our Lord one thousand nine hundred and two.

The condition of this obligation is such, that if the above-bounden Philip Cabot administrator with the will annexed, of the estate not already administered of Edmund Dwight late of Boston, in said County of Suffolk, deceased, testate, shall

29 First, make and return to said Probate Court, within three months after his appointment, a true inventory of all the

real and personal estate of said deceased which at the time of the making of such inventory shall have come to the possession or knowledge of said administrator;

Second, administer according to law and to the will of said deceased all the personal estate of said deceased not already administered which may come to the possession of said administrator, or of any person for him, and also the proceeds of any of the real estate of said deceased that may be sold or mortgaged by said administrator; and

Third, render upon oath, a true account of his administration at least once a year, until his trust is fulfilled, unless he is excused therefrom in any year by said Court, and also render such account at such other times as said Court may order.

Then this obligation to be void, otherwise to remain in full force and virtue.

PHILIP CABOT. [SEAL.]

Signed, sealed and delivered in presence of
WILLIAM MASON.

SUFFOLK, *ss:*

Jan. 30, A. D. 1902.

Examined and approved.

JAMES H. FLINT,
Acting Judge of Probate Court.

I, Philip Cabot the within-named administrator, declare that, to the best of my knowledge and belief, the estate and effects of the within-named deceased remaining to be administered do not exceed in value the following-mentioned sums, viz.:

Real Estate $—.

Personal Estate, $2100.00.

(Sign.) PHILIP CABOT.

30 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Probate Court.

[SEAL.]

To Philip Cabot of Boston, in the County of Suffolk and Commonwealth aforesaid:

You are appointed administrator with the will annexed of the estate not already administered of Edmund Dwight late of Boston, in the County of Suffolk, deceased, testate, which will was proved and allowed on the twenty-eighth day of June A. D. 1900, by said Court, and is now of record in this Court:

And you are required to make and return to said Probate Court, within three months from the date hereof, a true inventory of all the real and personal estate of said deceased, which at the time of

the making of such inventory shall have come to your possession or knowledge;

To administer according to law and to the will of said deceased all the personal estate of said deceased, which may come to your possession, or that of any person for you, and also the proceeds of any of the real estate of said deceased that may be sold or mortgaged by you;

To render, upon oath, a true account of your administration, at least once a year, until your trust is fulfilled, unless excused therefrom, in any year, by said Court;

And also, within three months, to cause notice of your appointment to be published once in each week for three successive weeks, in the Boston Daily Advertiser a newspaper published in Boston, and return your affidavit of having given such notice, with a copy thereof, to the Probate Court.

Witness, John W. McKim, Judge of said Court, at Boston, this thirtieth day of January in the year of our Lord one thousand nine hundred and two.

ELIJAH GEORGE, *Register.*

31 II. *General Traverse.*

Court of Claims.

No. 32970.

JENNIE LATHROP RAND

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

32 III. *History of Proceedings.*

On December 19, 1916, the case was argued by Mr. H. T. Newcomb, for the claimant, and by Mr. Seth Shepard, Jr., for the defendants, and the case was submitted.

On January 8, 1917, the Court filed findings of fact and conclusion of law and dismissed the petition with an opinion by Downey, J.

On January 29, 1917, the court, on its own motion, filed an order withdrawing opinion filed January 8, 1917, and filed a new opinion. Former findings of fact and conclusion of law to stand as of January 8, 1917.

Said findings of fact, conclusion of law, and opinion (as amended) are as follows:

33 IV. *Findings of Fact, Conclusion of Law, Filed January 8, 1917, and Opinion of the Court, Filed January 29, 1917.*

JENNIE LATHROP RAND

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

Jennie Lathrop Rand is a citizen of the United States and of the State of Massachusetts, residing in Cambridge, Massachusetts, and is the Mrs. Jennie Lathrop Rand named in the last will and testament of Edmund Dwight, deceased, late of Boston, in said State. She brings this suit in her own right.

II.

On June 6, 1900, Edmund Dwight, a citizen of the United States and of the State of Massachusetts, and a resident of Boston, in said State, died testate, and his last will was duly admitted to probate and record on June 28, 1900, in the probate court for the county of Suffolk, in the State of Massachusetts, which court had jurisdiction. Elizabeth Cabot, a sister of decedent, was named in said will as executrix thereof, letters testamentary were issued to her by said court, and she accepted, qualified, and entered upon the discharge of the duties of said trust. On the 30th day of January, 1902, said Elizabeth Cabot, having died without finally completing the administration of said estate, Philip Cabot, her son, was appointed administrator thereof, with the will annexed, and accepted said trust and duly qualified. The will of said decedent, so far as material, provided as follows:

"I give to the New England Trust Company, a corporation duly chartered by the State of Massachusetts, and located in the city of Boston, the sum of one hundred and twenty-five thousand dollars ($125,000), to be invested in the general trust fund of the company and held upon the following trusts:

"To pay to Mrs. Jennie Lathrop Rand, now living at forty-nine Kirkland Street, Cambridge, the annual net income thereof in semi-annual payments during her life; after her death to pay said annual net income to such one or more of her three children, Margaret Arnold, Henry Lathrop, and Edward Lathrop, as shall sur-
34 vive her and as she shall appoint by her last will or by other instrument in writing signed by her and attested by three witnesses. By the said appointment the said Jennie may dispose of the said annual net income among her said surviving children in

such manner and proportions as she shall deem best; but she shall have no power to appoint any part of said annual net income to any such child for a term longer than the life of such child. In default of such appointment, or at my death, if the said Jennie should die before me, the said annual net income shall be paid in equal shares to the said Margaret and Henry so long as they both shall live. On the death of either of them, or if on the death of the said Jennie, or at my death after the death of the said Jennie, only one of them be living, then to the survivor during his or her life; on the death of the survivor, or if on the death of the said Jennie, or at my death after the death of the said Jennie, both said Margaret and Henry be deceased, then to the said Edward for his life. I desire that any of the income of the fund hereinbefore given which may be paid to the said Margaret shall be paid to her for her sole and separate use, free from the interference or control of any husband she may marry.

"After the death of the last survivor of the said Jennie, Margaret, Henry, and Edward I direct that said fund be paid to the president and fellows of Harvard College, to be used by them, principal and interest, as they shall think best for the benefit of the university, and this trust shall then terminate."

III.

On October 1, 1900, the trust fund of $125,000 was deposited with the New England Trust Company, the trustee designated in the will, which accepted the trust under an agreement made in accordance with the rules of said company by which interest thereon did not begin to run until December 1, 1900. The said fund was not invested separately, but as a part of the general trust fund of said company out of the aggregate net income, of which each beneficiary was paid his proportionate part. Proportionate payments of the aggregate net income of said general trust fund have been made to claimant in the sums and on the dates set forth below:

Date of payment.	Amount of payment.	Date of payment.	Amount of payment.
January 1, 1901	$390.63	July 8, 1908	$2,187.50
July 1, 1901	2,343.75	January 1, 1909	2,187.50
January 1, 1902	2,343.75	July 1, 1909	2,187.50
July 1, 1902	2,343.75	January 1, 1910	2,187.50
January 1, 1903	2,343.75	July 1, 1910	2,343.75
July 1, 1903	2,343.75	January 2, 1911	2,343.75
January 1, 1904	2,343.75	July 1, 1911	2,343.75
July 1, 1904	2,343.75	January 1, 1912	2,500.00
January 2, 1905	2,187.50	July 1, 1912	2,500.00
July 7, 1905	2,187.50	January 1, 1913	2,500.00
January 1, 1906	2,187.50	July 1, 1913	2,500.00
July 7, 1906	2,187.50	January 1, 1914	2,500.00
January 1, 1907	2,187.50	July 1, 1914	2,497.50
July 6, 1907	2,187.50	January 1, 1915	2,187.50
January 1, 1908	2,187.50		

35 No other payments out of, or on account of, this trust were made to Mrs. Rand or for her benefit, nor did she become entitled to any other or additional payments on account of said trust.

IV.

On the 27th day of September, 1900, Elizabeth Cabot made to the United States Bureau of Internal Revenue a return of legacies in her charge as executrix and passing from the estate of said Edmund Dwight to the persons named therein, together with the amount of such legacies and the amount of duty or tax accrued thereon according to the provisions of the internal-revenue laws of the United States, in which she returned a legacy to Jennie Lathrop Rand, aged 63, stranger to the decedent, of the clear value of $125,000, with an exemption claimed of $1,964.69, and in which she stated the amount taxable to be $40,355.91, with $7.50 per hundred dollars as the rate of taxation and the amount of tax as $3,026.69, and reported said legacy as in trust with the New England Trust Company. The amount of $1,964.69, claimed as exempted, was State of Massachusetts inheritance tax. It is not shown that the collector of internal revenue, or any other officer of the United States in authority in the matter, then made any demand upon the executrix or upon this claimant for the payment of said tax, but, on the 28th day of September, 1900, Elizabeth Cabot paid to the proper collector of internal revenue, and said collector received from Elizabeth Cabot, in payment of said tax, the said sum of $3,026.69, which sum was, in the usual course of business, turned over by said collector to the United States and has been since and is still retained by the United States. Said sum was advanced by said Elizabeth Cabot for the purpose of paying said tax at the request of this claimant, Jennie Lathrop Rand and Margaret Arnold Rand, Henry Lathrop Rand, and Edward Lathrop Rand and pursuant to an agreement entered into on the 28th day of September, 1900, as follows:

"This agreement, made this 28th day of September, 1900, by and between Elizabeth Cabot, of Brookline, in the county of Norfolk and Commonwealth of Massachusetts, party of the first part, and Jennie Lathrop Rand, Margaret Arnold Rand, Henry Lathrop Rand, and Edward Lathrop Rand, all of Cambridge, in the county of Middlesex and Commonwealth aforesaid, parties of the second part, witnesseth that—

"Whereas by the will of Edmund Dwight, late of Boston, the sum of one hundred and twenty-five thousand ($125,000) dollars was given to the New England Trust Company in trust to pay to the said Jennie Lathrop Rand the annual net income thereof in semiannual payments during her life, and after her death to pay said income to such of the other parties of the second part as she shall by will appoint, and in default of such appointment to pay said income to said other parties of the second part or the survivors of them as long as any one of them shall survive; and after the death of the last survivor of said parties of the second part to pay over the principal sum

then remaining in the hands of said trustees to the president and fellows of Harvard College; and

36 "Whereas the said life interest of the said Jennie is subject to a tax of one thousand nine hundred and sixty-four dollars and sixty-nine cents ($1,964.69), due to the Commonwealth of Massachusetts under the provisions of chapter 425 of the acts of 1891, entitled 'An act imposing a tax on collateral legacies and successions,' and to a tax of three thousand and twenty-six dollars and sixty-nine cents ($3,026.69), due to the United States under the provisions of an act of Congress entitled 'The war-revenue act of 1898'; and

"Whereas said taxes are payable out of the income of said fund; and

"Whereas it is the duty of the executrix of said will to hold said principal sum and pay said taxes out of the income thereof when a sufficient amount has accumulated for that purpose, unless the taxes are sooner paid by the beneficiary or by some one on her behalf; and

"Whereas it would be inconvenient for said parties of the second part to have the time of payment of the income of said trust fund deferred, or for the said Jennie or for the other parties of the second part to pay the amount of said taxes themselves;

"Now, therefore, in consideration that the said Elizabeth Cabot has, at the request of said parties of the second part, advanced the sum necessary to pay said taxes, namely, four thousand nine hundred and ninety-one dollars and thirty-eight cents ($4,991.38), and said taxes have actually been paid by her, we, the said parties of the second part, do jointly and severally agree to pay to said Elizabeth Cabot, her heirs, executors, administrators, and assigns, the sum of four thousand nine hundred and ninety-one dollars and thirty-eight cents ($4991.38), with interest thereon at the rate of four (4) per cent per annum, in instalments, payable semiannually, or quarterly if the income of said fund is paid quarterly by said trustee, and in either event upon the same days that the income of said trust fund is paid to us or any one of us by said trustees. The amount of each of said instalments shall be one thousand ($1,000) dollars if said income is paid semiannually and five hundred ($500) dollars if paid quarterly so long as the balance due on said debt with accrued interest thereon shall equal or exceed the amount of an instalment, and the last instalment shall be the balance of said debt. But in case any semiannual payment of income shall be less than one thousand ($1,000) dollars or any quarterly payment less than five hundred ($500) dollars the amount of the instalment due on that day shall be the amount of the income then paid. Said parties of the second part are at liberty to anticipate the payment of any instalment or instalments, and in all cases interest on said debt shall run only on the amount thereof remaining unpaid.

"It is understood that this agreement does not bind the heirs, executors, or administrators of any of said parties of the second part to pay any instalment falling due after his or her death.

"In witness whereof we have hereunto set our hands and affixed our seals the day and year first above written.

"ELIZABETH CABOT. [SEAL.]
"JENNIE LATHROP RAND. [SEAL.]
"MARGARET ARNOLD RAND. [SEAL.]
"HENRY LATHROP RAND. [SEAL.]
"EDWARD LATHROP RAND. [SEAL.]"

37 The money advanced under this agreement by Elizabeth Cabot with which to pay this tax was advanced out of the funds of the estate of Edmund Dwight, and was afterwards repaid with interest by Jennie Lathrop Rand, the claimant herein. So far as appears, there was no protest or any action in any way indicative of protest against the assessment and collection of this tax either by the executrix, the trustee, or any of the beneficiaries under the trust.

V.

On December 16, 1898, the Commissioner of Internal Revenue prescribed and promulgated certain general rules, tables, and instructions for the use of internal-revenue officers and administrators, executors, and trustees in determining the amount of tax to be paid to the United States upon legacies or distributive shares arising from personal property under the revenue act of June 13, 1898, under which rules, tables, and instructions the said sum of $3,026.69 was determined to be the proper tax under said act upon the interest of this claimant in said trust under the will of said decedent and under which rules, tables, and instructions all taxes under said act upon like and similar interests were calculated. Said rules, tables, and instructions were as follows:

"[Series 7, No. 3—Revised, Supplement No. 1. United States Internal Revenue.]

"*Tables Showing the Present Worth of an Annuity, Life Interest, and of a Reversionary Interest, with Instructions for the Use Thereof in the Computation of Tax on Legacies and Distributive Shares.*

"(December 16, 1898. Washington: Government Printing Office. 1898.)

"[Series 7, No. 3—Revised, Supplement No. 1. United States Internal Revenue.]

"Instructions Concerning the Tax on Legacies and Distributive Shares.

"Treasury Department,

"Office of the Commissioner of Internal Revenue,

"Washington, D. C.,
"December 16, 1898.

"The following tables, showing the present worth of an annuity, life interest, and of a reversionary interest, with explanatory notes

and examples, are hereby published and promulgated for the use of internal-revenue officers and administrators, executors, or trustees in determining the duty or tax to be paid to the United States upon legacies or distributive shares arising from personal property, imposed by the act of June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes.'

"N. B. SCOTT,
"Commissioner.

"Approved:
"O. L. SPAULDING,
"Acting Secretary of the Treasury."

["United States Internal-Revenue Adjustment, 1898."]

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.	Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
10....	38.891	$19.45359	$0.21332	55....	15.243	$10.99789	$0.53931
11....	38.507	19.36943	0.21656	56....	14.689	10.66982	0.55116
12....	38.113	19.28184	0.21993	57....	14.143	10.35931	0.56310
13....	37.710	19.19065	0.22344	58....	13.603	10.04630	0.57514
14....	37.298	19.09590	0.22708	59....	13.072	9.73131	0.58726
15....	36.877	18.99764	0.23086	60....	12.549	9.41474	0.59943
16....	36.447	18.89569	0.23478	61....	12.029	9.09765	0.61163
17....	36.010	18.79010	0.23884	62....	11.532	8.78052	0.62382
18....	35.565	18.68070	0.24305	63....	11.039	8.46412	0.63600
19....	35.113	18.56751	0.24740	64....	10.557	8.13888	0.64812
20....	34.652	18.45038	0.25191	65....	10.088	7.83552	0.66017
21....	34.186	18.32932	0.25656	66....	9.630	7.52476	0.67212
22....	33.711	18.20416	0.26138	67....	9.185	7.21699	0.68396
23....	33.230	18.07471	0.26636	68....	8.753	6.91298	0.69565
24....	32.742	17.94097	0.27150	69....	8.333	6.61301	0.70719
25....	32.248	17.80274	0.27682	70....	7.926	6.31716	0.71857
26....	31.747	17.65984	0.28231	71....	7.532	6.02612	0.72976

27....	31.239	17.51224	0.28799
28....	30.725	17.35968	0.29386
29....	30.205	17.20225	0.29991
30....	29.678	17.03961	0.30617
31....	29.147	16.87176	0.31262
32....	28.608	16.69846	0.31929
33....	28.067	16.51964	0.32617
34....	27.516	16.33503	0.33327
35....	26.961	16.14437	0.34060
36....	26.401	15.94755	0.34817
37....	25.834	15.74427	0.35599
38....	25.263	15.53421	0.36407
39....	24.685	15.31722	0.37241
40....	24.101	15.09295	0.38104
41....	23.511	14.86102	0.38996
42....	22.915	14.62122	0.39918
43....	22.313	14.37356	0.40871
44....	21.708	14.11860	0.41852
45....	21.103	13.85713	0.42857
46....	20.499	13.58958	0.43886
47....	19.896	13.31698	0.44935
48....	19.298	13.03942	0.46002
49....	18.703	12.75716	0.47088
50....	18.113	12.47032	0.48191
51....	17.527	12.17919	0.49311
52....	16.947	11.88408	0.50446
53....	16.372	11.58531	0.51595
54....	15.804	11.28325	0.52757
72....	7.151	5.74003	0.74077
73....	6.782	5.45928	0.75157
74....	6.425	5.18402	0.76215
75....	6.081	4.91463	0.77251
76....	5.749	4.65125	0.78264
77....	5.428	4.39383	0.79254
78....	5.119	4.12486	0.80220
79....	4.823	3.89858	0.81159
80....	4.537	3.66071	0.82074
81....	4.262	3.42900	0.82965
82....	3.995	3.20258	0.83836
83....	3.737	2.98024	0.84691
84....	3.484	2.76106	0.85534
85....	3.236	2.54366	0.86371
86....	2.992	2.32795	0.87200
87....	2.752	2.11384	0.88024
88....	2.517	1.90115	0.88842
89....	2.286	1.69107	0.89650
90....	2.062	1.48540	0.90441
91....	1.845	1.28432	0.91214
92....	1.637	1.09024	0.91961
93....	1.442	0.90647	0.92667
94....	1.263	0.73687	0.93320
95....	1.103	0.58435	0.93906
96....	0.975	0.46182	0.94378
97....	0.877	0.36698	0.94742
98....	0.746	0.24038	0.95229
99....	0.500	0.00000	0.96154

39 "Example 1. A person dying bequeaths to his nephew, aged forty years, an annuity of one thousand dollars during life. What is the present value of the annuity?

"Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged forty years, is fifteen dollars nine cents two mills and ninety-five one-hundredths of a mill ($15.09295); therefore the present value of one thousand dollars is one thousand times as much, or fifteen thousand and ninety-two dollars and ninety-five cents, the amount upon which tax accrues.

"Example 2. A person dying bequeaths to his daughter, aged thirty-five years, a life interest in personal property amounting to fifty thousand dollars ($50,000), the estate to revert absolutely at her death to other parties. Required the present value, at the date of death of the testator, of the life interest of the daughter in the estate; also, required at the same date, the present value of the reversionary interest of said other parties in the estate.

"At a net interest of four per cent per annum, the assumed rate, the estate of $50,000 will realize an income or annuity of $2,000 per annum. The present value of the sum of $1.00, payable at the end of each year during the life of a person aged thirty-five years, is found by the table to be $16.14437, and the present value of an annuity of $2,000 for the same time would be two thousand times as much, or $32,288.74, the amount upon which tax accrues.

"The reversion or present value of $1.00, due at the end of the year of death of a person aged thirty-five years, is found by the table to be $0.34060, and such value of $50,000 would be fifty thousand times as much, or $17,030, the amount upon which tax accrues.

"NOTE.—This table is based on the 'actuaries' or 'combined experience table,' money being worth 4 per cent per annum.

"The first column shows the age of the person under consideration.

"The second column shows the corresponding 'mean redemption period' and represents the time in years in which the present values of annuities and reversions certain will become equal, respectively, to the present values of annuities and reversions contingent on the duration of life.

"The 'mean redemption period' is a mean between the last payment of the annuity and the payment of the reversion, averaging six months later than the former payment and six months earlier than the latter payment.

"The third column shows the present value of an annuity for life of one dollar per annum, the last payment being made at the end of the year prior to the one in which death occurs.

"The fourth column shows the present worth of one dollar payable at the end of the year in which death occurs.

"NOTE.—This adjustment has been prepared under the direction of Mr. J. S. McCoy, Government actuary.

40 *Present Value of Annuities and Reversions Certain Upon a 4 Per Cent Basis.*

Number of years.	Present worth of an annuity of one dollar payable at the end of each year, for a certain number of years.	Present worth of one dollar payable at the end of a certain number of years.	Number of years.	Present worth of an annuity of one dollar payable at the end of each year, for a certain number of years.	Present worth of one dollar payable at the end of a certain number of years.
1	$0.96154	$0.961538	16	$11.65229	$0.533908
2	1.88609	0.924556	17	12.16567	0.513373
3	2.77509	0.888996	18	12.65929	0.493628
4	3.62989	0.854804	19	13.13394	0.474642
5	4.45182	0.821927	20	13.59032	0.456387
6	5.24214	0.790314	21	14.02916	0.438834
7	6.00205	0.759918	22	14.45111	0.421955
8	6.73274	0.730690	23	14.85684	0.405726
9	7.43533	0.702587	24	15.24696	0.390121
10	8.11089	0.675564	25	15.62208	0.375117
11	8.76047	0.649581	26	15.98277	0.360689
12	9.38507	0.624597	27	16.32958	0.346816
13	9.98565	0.600574	28	16.66306	0.333477
14	10.56312	0.577475	29	16.98371	0.320651
15	11.11839	0.555265	30	17.29203	0.308319

"Example. A man dies leaving personal property to the amount of $50,000, his daughter to have the income from it for 20 years; it then to revert to his youngest son. What is the present worth of these legacies?

"The income from $50,000 would be $2,000 per annum, assuming money at 4 per cent.

"The present worth of an annuity of $2,000 for 20 years will be 2,000 times an annuity of $1.00 for 20 years. In the table opposite 20 we find the value of an annuity of $1.00 to be $13.59032; therefore the present worth of an annuity of $2,000 will be $27,180.64.

"A reversion of $1.00 at the end of 20 years is shown by the table to be $0.456387, and a reversion of $50,000 will be 50,000 times as much, or $22,819.35."

VI.

The average interest earned by trust funds throughout the United States during the period from June 13, 1898, to January 1, 1901, was from three and one-half to four per centum per annum. The rate of four per cent adopted in the tables set out in Finding V as the average future earning power of invested funds was, for the purpose, a reasonable rate.

VII.

The expectancies of life shown in the tables set out in Finding V are taken from what is known as the "combined experience tables"

and are reasonable. They are slightly less than shown in other tables in general use at the time.

41 VIII.

The only assessment ever made under the provisions of sections 29 and 31 of the act of Congress of June 13, 1898, and amendments, upon the interest of this claimant in the trust fund created by the will of said decedent, was made in pursuance and in accordance with the rules, tables, and instructions set out in Finding V, and there was no specific investigation by the Commissioner of Internal Revenue as to this claimant's expectancy of life or as to the earning capacity of the trust fund here involved otherwise than by the application of said tables. The value of claimant's inherited interest was determined from said tables to be $42,320.60, from which was deducted $1,964.69, the amount of inheritance tax of the State of Massachusetts, leaving a net value of $40,355.91 upon which the tax was assessed at the statutory rate of $7.50 per hundred dollars. The computation was from the date of the death of the decedent. The claimant was yet in life on the 16th day of April, 1915, and her death has not been suggested to this court.

IX.

Under authority of the act of Congress of July 27, 1912 (37 Stat., 240), a claim for the refund of said sum of $3,026.69 was filed with the Commissioner of Internal Revenue on the 24th day of December, 1913. Said claim was as follows:

"DISTRICT OF COLUMBIA, *ss:*

"H. T. Newcomb, of the city of Washington and District aforesaid, being duly sworn accordingly to law, deposes and says that he is attorney for the New England Trust Co., of Boston, trustee, under the will of Edmund Dwight; that the executrix was assessed an internal-revenue tax of three thousand twenty-six and 69/100 dollars, on legacies passing under the said will, which amount she afterwards, on the 28th day of September, A. D. 1900, paid to James D. Gill, Esq., collector of internal revenue for the third district of Massachusetts, and which amount, as this deponent verily believes, should be refunded for the following reasons, viz:

"That the sum herein claimed was erroneously and illegally collected and contrary to the provisions of the war revenue act of June 13, 1898, and amendments, and that the said sum should be refunded by virtue of the act of June 27, 1902 (32 Stat., 406), and the act of July 27, 1912.

"And this deponent now claims that, by reason of the payment of the said sum of three thousand twenty-six and 69/100 dollars, the trustee is justly entitled to have the sum of three thousand twenty-six and 69/100 dollars refunded, and he now asks and demands the same.

"And this deponent further makes oath that the said claimant is not indebted to the United States in any amount whatever.

"H. T. NEWCOMB.

"Sworn to and subscribed before me this 15th day of December, A. D. 1913.

"[SEAL.] MARY E. PETER."

42 This claim was rejected by the Acting Commissioner of Internal Revenue on the 28th day of March, 1914. It is not shown that any claim for the refund of said amount, or any part thereof, was ever filed with the Commissioner of Internal Revenue by the claimant, Jennie Lathrop Rand, or by any other person acting for her or in her behalf.

Conclusion of Law.

Upon the foregoing facts the court concludes as matter of law that the plaintiff's petition ought to be dismissed, and it is so ordered.

Substituted Opinion of January 29, 1917.

DOWNEY, *Judge*, delivered the opinion of the court.

The plaintiff in this action seeks to recover $3,026.69, alleged to have been unlawfully assessed and collected under sections 29 and 30 of the war-revenue act of June 13, 1898, as a legacy tax on the interest of the plaintiff in a trust fund of $125,000, arising under the will of Edmund Dwight, deceased. The facts are very fully set out in the findings and are too voluminous to justify repetition here.

We are favored with elaborate and able briefs on the questions upon which counsel assume that the decision of the case must depend, and we have found the facts necessary to their determination, but, to us, it appears that there are preliminary and material questions for our consideration which have not received the attention of counsel on either side, and the determination of which may render it unnecessary for us to give any consideration to the questions discussed.

Suit on this claim would have been barred under section 3227, R. S., which provides that such actions as this must be brought within two years next after the cause of action accrued, and the filing of a claim with the Commissioner of Internal Revenue would have been barred under section 3228, R. S., which requires that the claim be filed within two years next after the cause of action accrued, but for the act of July 27, 1912, 37 Stat., 240, which authorized the filing of such claims with the Commissioner of Internal Revenue at any time on or before the first day of January, 1914, but not thereafter.

However, section 3226, R. S., as amended, is unaffected by the act of July 27, 1912, and that section prohibits the maintenance of

any suit in any court for the recovery of any internal tax allege
to have been erroneously or illegally assessed or collected until ap
peal shall have been made to the Commissioner of Internal Revenue
according to the provisions of law in that regard, and the regulation
of the Secretary of the Treasury established in pursuance there
and a decision of the commissioner has been had therein, with
proviso that if such decision is delayed more than six months fro
the date of such appeal suit may then be brought without first hav
ing a decision of the commissioner. That compliance with this se
tion of the statute is essential before suit may be maintained ha
been frequently held and is now practically an uncontroverte
proposition. The Collector v. Hebbard, 12 Wall., 1-14; Savings In
stitution v. Blair, 116 U. S., 200; Savings Bank v. United States, 1
C. Cls., 335; Erskine v. Hornbach, 14 Wall., 613; Commissioner
v. Buckner, 48 Fed. Rep., 535; Christie-Street Com. Co. v
43 U. S. 129 Id., 506; S. & S. Co. v. Rucker, 143 Id., 656; Has
ings v. Herald, 184 Id., 759.

The plaintiff presumably relies, as compliance with this section
the statute, upon a claim filed with the Commissioner of Interna
Revenue on the 24th day of December, 1913, set out in Finding IX
and its rejection on the 28th day of March, 1914. This claim
signed "H. T. Newcomb," and in the body thereof he is shown to
"attorney for the New England Trust Company, of Boston, truste
under the will of Edmund Dwight," and a power of attorney ex
cuted to him by the New England Trust Company as trustee is
file, although not brought into the record on which the case is su
mitted. It does not appear that any claim was ever filed by Jenn
Lathrop Rand, the plaintiff herein, who brings this suit in her ow
proper right.

We question, in the first place, the propriety of the presentati
of any claim to the Commissioner of Internal Revenue by the Ne
England Trust Company, since it not only does not appear that th
trust company paid this tax, but it does appear that it was pai
with money procured by the plaintiff to be furnished for the pu
pose, before the trust fund went into the hands of the trust co
pany. But, without regard to whether the trust company mig
properly have filed a claim for refunder, and even assuming f
present purposes that it might have done so, it seems too conclusiv
to justify argument that a claim so filed with the Commissioner
Internal Revenue could not, under this statute, constitute the requ
site basis for a suit in this court by Jennie Lathrop Rand in her ow
right. If we are correct in this conclusion, and it seems to us th
there can be no question about it, it is clear that upon that groun
alone this suit may not be maintained. But there is yet anoth
undiscussed question to which we will briefly refer.

It appears that on the 27th day of September, 1900, Elizabe
Cabot, then the executrix of the will of Edmund Dwight, decease
made a return to the Commissioner of Internal Revenue as to leg
cies under the will of said decedent, returning this trust fund as
trust with the New England Trust Co., with a statement as to tax
ble value of the interest of the plaintiff, Jennie Lathrop Ran

therein, and the amount of taxes due thereon. That on the same day this plaintiff, joined by others, entered into a contract with Elizabeth Cabot, set out in Finding IV, by which they procured the loan or advancement by Elizabeth Cabot of the money necessary to pay this tax, and that it was paid on the same day with funds loaned or advanced by Elizabeth Cabot out of the assets of the estate of Edmund Dwight, and that the sum so loaned or advanced was thereafter repaid by Jennie Lathrop Rand. This transaction was two days before the trust fund of $125,000 was turned over to the New England Trust Company.

It seems quite clear to us that this payment was wholly within the rule with reference to voluntary payments. It is quite well settled that taxes voluntarily paid, not under protest or with notice of intention to test their validity, and not under duress, can not be recovered. Cox v. The Collector, 12 Wall., 204-209; Folsom v. United States, 4 C. Cls., 366; United States v. Edmonston, 181 U. S., 500; Cheseborough v. United States, 192 U. S. 253; United States
44 v. N. Y. & Cuba Mail S. S. Co., 200 U. S., 488; Christie-Street Commission Co. v. United States, 126 Fed. Rep., 991; Herold v. Kahn, 159 Fed. Rep., 608; Thacher v. United States, 149 Fed. Rep., 902; Newhall v. Jordan, 149 Fed. Rep., 586; Beer v. Moffatt, 192 Fed. Rep., 984.

It does not appear that there was any protest whatever against the assessment of this tax, or that it was paid with any declaration of any intention whatever to contest its validity. If it is to be relieved from the onus of a voluntary payment, it must be upon the theory alone that it was paid under compulsion of law amounting to such duress as relieved from the necessity of protest. This theory, we think, can not be maintained. The authorities will not support it. Citations, supra.

We make no point upon any possible question as to whether there was any obligation on the executrix to pay this tax before the trust fund itself was turned over to the trustee. She did it and not only without protest but, so far as appears, without demand made upon her for its payment, and while, treated as a payment by her and properly made, it must be regarded as, in legal contemplation, a voluntary payment, there are circumstances which require us to go one step further to reach the true situation.

Under the facts as they appear in this case, it is shown that this tax was paid with money loaned or advanced by the executrix out of the assets of the estate of Edmund Dwight, pursuant to an agreement entered into as between her, individually, and this plaintiff joined by others in interest. We need not discuss the question as to the right of the executrix to advance money from the assets of the estate for this purpose. She did it. If she did it without authority, and the estate suffered, the liability was upon her and her bond. But, however that may be, this plaintiff procured, by her agreement to repay, the loan or advancement of the money used for the purpose, and afterward repaid it, and it must be concluded, from all the facts, that the payment when made was, in effect, made by this plaintiff. She was under no obligation to make it, at least at the

time payment was made. It was not necessary that she should make it in order to protect her interests under the trust. It was evidently a mere matter of convenience to the end that she might repay it in installments and avoid the deduction of the whole amount of the tax, at one time, either from the body of the trust fund or, and as they understood the situation, from the legacies accruing to her. The facts of the case carry it far beyond those appearing in most of the cases held by the courts to have been within the rule as to voluntary payments.

Lest it may be assumed that we have not given it consideration, it may be well to distinguish the case of United States v. Hvoslef, 237 U. S., 1, in which it was held that there might be recovery without protest having been made.

In that case recovery was sought of the amount paid as stamp taxes on certain charter parties under section 25 of the war-revenue act of 1898. The act of June 27, 1902 (32 Stat., 406), and other refunding statutes hereinafter cited, had provided specifically for the refunding of certain classes of taxes collected under the war-revenue act of 1898. Since the fact appears beyond question
45 that the taxes sought to be recovered in this case are not within any of the classes enumerated in any of the refunding acts, that fact would easily dispose of the question of the applicability of that case to this one but for some language in the opinion apparently giving possible room for another view.

The time having expired within which claims might be filed or actions instituted for refunder of taxes either under the act of 1902 or other refunding acts or under the general statute with reference to refunder of taxes erroneously assessed, Congress on July 27, 1912, passed "An act extending the time for the repayment of certain war-revenue taxes erroneously collected." 37 Stat., 240. By the first section of that act it was provided that claims for the refunding of any taxes erroneously or illegally assessed or collected under section 29 of the war-revenue act of 1898 might be presented to the Commissioner of Internal Revenue on or before January 1, 1914, but not thereafter. By the second section the Secretary of the Treasury was directed to pay to such claimants as have so presented their claims "and shall establish such erroneous and illegal assessment and collection" any amounts paid by them.

The decision in the Hvoslef case, if not carefully studied in the light of various statutes and other decisions, may leave some room for doubt as to its meaning by reason of the fact that the opinion states that the action was based on the act of July 27, 1912, holds protest unnecessary and in holding that that act is not limited to the refunding of death duties erroneously assessed under section 29 of the war-revenue act, as contended by the Government, quotes the words "any sums paid by them * * * to the United States under the provisions of the act aforesaid" from the second section of the act of 1912 authorizing payment by the Secretary of the Treasury.

The decision must be interpreted in the light of the particular case under consideration, all other statutes and rules of law proper

for consideration and necessarily known to the court and any other applicable expressions of the court in other cases.

The act of June 27, 1902, preceded as to certain limited cases by the act of May 12, 1900, was followed by other refunding acts, but up to the time of its passage any claims for refunder of taxes except those arising under the act of 1900 must have been made and could only be made under the general statute providing for the refunding of taxes erroneously or illegally assessed or collected. The assertion of a right to recover thereunder was subject to well established and uncontroverted principles of law and recovery could not be had if the payment was made without protest and under such circumstances as constituted a voluntary payment. The court in deciding the Hvoslef case was, of course, fully cognizant of this well-established rule and can not be presumed to have intended to abrogate a rule of such long standing except in classes of cases with reference to which legislation by Congress rendered it inapplicable.

In the Cheseborough case, 192 U. S. 253, recovery of stamp taxes on conveyances of real estate was sought under the general statute (section 3220), the doctrine as to protest and voluntary payment was strongly adhered to by the court, and it was held that the circumstances of the case did not render protest unnecessary. And referring to voluntary payments without protest the court
46 concludes, "We find no right of recovery, expressly or by necessary implication, conferred by statute in such circumstances." In the N. Y. & Cuba Mail S. S. Co. case, 200 U. S., 498, in which recovery was sought of the amount paid for documentary stamps used on manifests of cargoes bound to foreign ports, the Cheseborough case was followed with approval, and it was further held that the act of May 12, 1900, 31 Stat., 177, authorizing, by the use of the word "may," the Commissioner of Internal Revenue to make allowance for or redeem internal-revenue stamps spoiled, destroyed, or rendered unfit for the purpose intended, or which through mistake may have been improperly or unnecessarily used, did not destroy the difference between voluntary and involuntary payments of taxes. Here it is well to observe that the act cited provided that the Commissioner of Internal Revenue "may" make allowance for or redeem stamps upon receipt of satisfactory evidence of the facts, with a limitation of two years from the time of the purchase of the stamps, and the general statute (section 3220) provides that under certain regulations he is "authorized" to refund taxes erroneously or illegally assessed or collected, with a two-year limitation (section 3228), while the act of June 27, 1902, specifically directs the Secretary of the Treasury to refund certain classes of taxes, with no limitation prescribed, and hence subject to the limitation of section 3228.

Following the decision of February 19, 1906, in the N. Y. & Cuba Mail S. S. Co. case, Congress, by the act of March 4, 1907, 34 Stat., 1371-73, appropriated $125,000 to enable the Secretary of the Treasury to refund "the sums paid for documentary stamps used on export ships' manifest," the kind of refunder claimed in that case, "such stamps representing taxes which were illegally assessed and

collected, said refund to be made whether said stamp duties were paid under protest or not, and without being subject to any statute of limitations." By the act of February 1, 1909, 35 Stat., 590, the Secretary of the Treasury was "directed" to pay to those who had filed claims before July 1, 1904, the sums paid for documentary stamps used on foreign bills of exchange, drawn between July 1, 1898, and June 30, 1901, against the value of exports to foreign countries, "said stamps representing taxes which were illegally assessed and collected, said refund to be made whether said stamp taxes were paid under protest or duress or not." By the act of August 5, 1909 36 Stat., 118-120, the time for filing claims under the act of February 1, 1907, supra, was extended to December 1, 1909; by the act of June 25, 1910, 36 Stat., 774-779, it was extended to December 1, 1910; and by the act of August 26, 1912, 37 Stat., 595-626, it was extended to December 31, 1912.

A correct understanding of the effect of the decision in the Hvoslef case requires consideration of the holdings of the Supreme Court as to the validity of taxes of the kind directly and indirectly involved therein and the action of Congress with reference thereto.

In Fairbanks v. United States, 181 U. S., 283, decided April 15, 1901, it was held that the stamp tax imposed by the war-revenue act of 1898 on export bills of lading was a tax or duty on exports and therefore unconstitutional. Any such tax was therefore "illegally assessed," and Congress, in the second section of the act of June 27,
1902, directed the refunding of sums paid for documentary
47 stamps used on export bills of lading, "such stamps," the act says, "representing taxes which were illegally assessed and collected."

In N. Y. & Cuba Mail S. S. Co. v. United States it was held, on authority of the Fairbanks case by the district court, 125 Fed. Rep., 320, that the stamp tax imposed on manifests of cargoes for export was a tax on exports and unconstitutional. On appeal the case was disposed of on the question of voluntary payment without protest, but of the other question it is said in the opinion in the Hvoslef case that "the correctness of this ruling (by the district court) as to the invalidity of the tax was conceded by the United States. Followed the act of May 4, 1907, supra, providing for refunder of this particular class of stamp taxes without regard to protest and declaring that such stamps represented "taxes which were illegally assessed and collected."

These two cases involved two classes of stamp taxes provided for in the war-revenue act of 1898, (1) taxes on export bills of lading, (2) taxes on manifests of cargoes for export which were held to be taxes on exports, therefore unconstitutional, therefore "illegally assessed." They were followed by the Hvoslef case, which involved a stamp tax on certain charter parties which "were exclusively for the carriage of cargoes from ports in the States of the United States to foreign ports," and in which it was held, citing the Fairbanks case and the N. Y. & Cuba Mail S. S. Co. case, that this tax was also a tax on exports and unconstitutional. It was therefore illegal as were the other taxes of this character, ab initio.

After citing, in the opinion of the Hvoslef case, the act of 1902, directing, among other things, the refunding of taxes assessed on foreign bills of lading, and the act of 1907, directing the refunding of taxes on manifests of cargoes for export, and the act of 1909, directing the refunding of taxes on foreign bills of exchange drawn against the value of exports to foreign countries, a tax which under the decision cited must also have been held unconstitutional, and the three acts which extended the time for filing claims of the latter class, the court immediately thereafter refers to the act of 1912 which was also "An act extending the time," etc., and says:

"It thus appears that the act of 1912, upon which the present claim is based, was the culmination of a series of statutes which leave no question as to the intention of Congress to create an obligation on the part of the United States in favor of those holding *the described* claims (italics ours), and it follows that these claims must be deemed to be founded on a 'law of Congress' whithin the meaning of the provisions of the Tucker Act now incorporated in the Judicial Code."

The words used, "the described claims," probably were used with reference only to the classes of claims under discussion, but, be that as it may, this language is clearly directed to the question of jurisdiction and not in any sense to the question of protest or involuntary payment as a prerequisite to a right of recovery. It is followed by a reference to the jurisdiction of this court, a holding that the act of 1912 does not refer only to the refunding of taxes assessed under section 29 of the war-revenue act, as contended, but to any sums wrongfully collected, a necessary holding in view of the fact that none of the taxes considered in the cases referred to were collected under section 29, and a further consideration of the question of jurisdiction as to the particular district within which the suit might be brought.

18 The further language of the opinion, referring specifically to payments without protest, is for consideration. It is said:

"It is also apparent, in the light of the manifest purpose and scope of the legislation to which we have referred, that the contention based upon the absence of protest can not be sustained. Where taxes have been illegally assessed upon the "contingent interests" described in the refunding act of 1902 it has been held that recovery may be had although the taxes were paid without protest. United States v. Jones, supra. In the acts of 1907 and 1909, supra, with respect to stamp taxes on 'export ships' manifest' and on foreign bills of exchange against exports, Congress expressly provided for refunding whether the taxes had been paid under protest or not. The fact that these express words were not repeated in the act of 1912 can not, in view of the nature of the subject, be regarded as evidencing a different intent; rather must this act receive in this respect the same construction as that which has been given to the act of 1902. If it appeared that the sums sought to be recovered were not legally payable, and the claim was duly presented within the time fixed, the right to repayment was established by the express terms of the statute."

It must be evident that the first sentence is used with respect to

the legislation specifically directing the refunding of the classes of taxes held to be unconstitutional and hence "illegally assessed," and with which the court classes the particular taxes involved in the case under consideration, and if the act of 1912 is included in the reference we must revert for construction to the discussion of that particular act wherein it is discussed as involving a jurisdictional question and referred to as "a law of Congress" within the meaning of the Tucker Act, by virtue of which the United States consented to be proceeded against, for a limited time, in cases otherwise barred by limitation, and within which, for that purpose, was the case under consideration. If there were any doubt about the correctness of this view it is dispelled by the citation of the Jones case, 236 U. S., 106. Action was brought in that case under section 3 of the act of 1902, which directed the refunding of so much of any taxes collected upon any legacy or distributive share of personal property as may have been collected on "contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two," and the court held that the tax there in question "was collected upon distributive shares which neither were nor could have been vested in possession or enjoyment prior to July 1, 1902," and that "there was no right of immediate possession or enjoyment at the time designated in the refunding statute." The findings in this court from which the case was appealed show that the tax in question had been paid without protest. The question is eliminated from the case because the taxes were determined to be within a class which Congress by the act of 1902 had specifically directed should be refunded. It was only necessary, in order to procure refundment, to establish the fact that they were within the class and that the claim had been filed within the time given. Having established those facts the right to recover was founded on a "law of Congress" made to fit the particular case, and there was no duty to establish a right under the general statute.

49 Further in the quotation the court refers to the acts of 1907 and 1909, both dealing with taxes construed as taxes on exports and both directing refunder, and holds that the fact that words used therein as to protest are not repeated in the act of 1912 can not, "in view of the nature of the subject," be regarded as evidencing a different intent. The "nature of the subject" was the same as in the acts referred to. The subject was another tax held to be a tax on exports and unconstitutional. That holding determined it not only to be of the same general nature as the other taxes referred to but also determined it to have been illegal, ab initio, as Congress had declared, following the Supreme Court, with reference to the other taxes and there was in fact, as said, no reason for imputing a different intent. "Rather," it is then said, "must this act receive the same construction as that which has been given to the act of 1902." Rather, that is to say, must this act in so far as it relates to the classes of taxes under discussion, receive the construction put on the act of 1902 in the case cited as to that construction: the Jones case, and in fact the only case in which the construction is found, and that holding is to the effect that as to

the particular taxes referred to in that act, refunder of which was directed, the question of protest was eliminated. The use of the words "legally payable" in the concluding sentence raises some question of doubt as to the reason therefor since they are not "express terms" in any of the statutes under consideration. They are applicable in their probably intended meaning to the particular classes of taxes under consideration and held to be unconstitutional and which, so far as appears, were exclusively in the mind of the writer. The subject matter of the decision and its intended scope are for consideration and it is wholly unreasonable to assume that the court intended to embrace within the rule laid down all taxes provided for in the war-revenue act of 1898 and to run counter to a line of unquestioned decisions on the doctrine of protest and voluntary payment without reference to any of them. The Supreme Court does not disturb well-settled rules without definitely indicating its intention to do so and stating the reasons therefor. All the cases cited in this opinion are cited with approval and as authority and such as involve the question recognize the general rule as to voluntary payments without protest and consider cases to be excepted therefrom. In the instant case the taxes in question were not of the classes held to be illegal because unconstitutional and they were not within any of the classes directed to be refunded. Refunder is sought under the general statute and in at least one view it is said in the Hvoslef case "we are not concerned with questions arising under the general provisions of the internal-revenue laws." The conclusion is certainly justified that the holding in this case does not apply to such questions.

Of significance *is* the discussion of this question from one angle is the case of United States v. Edmonston, 181 U. S., 500. It is a well-considered case frequently cited and would scarcely have been overlooked by the court in deciding the Hvoslef case if, in the latter case, it had been intended to establish a rule applicable to all taxes. The holding in the Edmonston case is entirely in accord with the view taken herein. In that case it is said:

"The conclusion we draw from these cases (and no others in respect to the ruling of the Land Department are referred to) is different from that drawn by counsel. That Congress has power in all cases to waive the question of voluntary payment and provide that any mistake shall be corrected and any excess of payment refunded by the officer receiving it, or recovered by an action in the Court of Claims, is undoubted; that, as shown by these references, it has made provision in certain cases for a refunding by the department which has received the money is obvious; and provided for such refunding irrespective of the question of voluntary payment. Now, counsel would draw the inference that the question of voluntary payment has been waived by Congress in all cases of transactions between the Government through its administrative officers and private individuals except in customs cases, and that if there be no specific provision for refunding by the department in which the mistake has occurred, the party may come into the Court of Claims and enforce his right to recover.

Our conclusion is directly to the contrary, and that Congress, recognizing the rule of voluntary payment, believed that in certain instances it ought not to be enforced, and that the department which received money in excess of the legal charge or price should refund, and so legislated, intending to leave all other cases subject to express statutory requirement of protest or to the ordinary and well-established rule as to the effect of voluntary payment."

Some reference is made to language found in the second section of the act of 1912, authorizing the Secretary of the Treasury to pay to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection any sums paid by them, etc. Its purpose seems quite apparent. It was not to broaden any right given or to relieve from any otherwise necessary requirement in the establishing of erroneous or illegal assessments, but was to permit the carrying into effect of a finding by the Commissioner of Internal Revenue that a tax had been erroneously or illegally assessed and collected by the repayment of the money so collected. Without authority to repay, a finding that one was entitled to repayment would be of little value. Money could not be withdrawn from the Treasury for purposes of repayment except by virtue of an appropriation or an authority equivalent to an appropriation. There was such an authority in the special refunding statutes which have been considered. For example, the act of 1902 directed the Secretary of the Treasury "to pay out of any money in the Treasury not otherwise appropriated," etc. All acts containing such a provision, or substantially such a one, had within them the authority to make them effective for the return of the money. Had the section in question been omitted from the act of 1912, there would have been no authority in the commissioner or the Secretary to actually pay the money back in cases arising under the general statute, as does the instant case, and report to Congress for appropriation would have been necessary in case of allowance. The general statute finds its effectiveness in what is called a "permanent annual" appropriation. Revised Statutes, section 3689. It has been specifically held in the Treasury Department for nearly 40 years, the ruling having been promulgated in a departmental circular of December 14, 1877, that the appropriations made under this section are annual appropriations, and subject to the usual limitations on the use of such appropriations. The statutory limitation is "two fiscal years,"
51 and but for the section in question the very claim involved in this case, if it had been allowed by the Commissioner of Internal Revenue, must have been reported to Congress as an allowed claim to be appropriated for before payment could be made. In fact, the appropriation for the payment of claims, filed before January 1, 1914, under the act of 1912, for refunder, under the general statute, of taxes erroneously or illegally assessed and collected, is raised on the books of the Treasury Department by authority of the second section of the act of 1912, and not otherwise. In the necessity is found the reason for the section, and they are the best possible guides as to its purpose and meaning.

The conclusion upon the two points discussed are, either of them,

so decisive of this case that we regard it as unnecessary to discuss the question presented by counsel as to the validity of the assessment. The case must be dismissed, and it is so ordered.

52 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 8th day of January, A. D., 1917, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the claimant, Jennie Lathrop Rand, is not entitled to recover and shall not recover any sum in this action from the defendants, the United States; and that the petition in this cause be dismissed.

By the COURT.

53 VI. *History of Proceedings After Entry of Judgment.*

On February 6, 1917, the claimant filed a motion for a new trial and amendment of the findings of fact, which motion was ordered to the law calendar February 6, 1917.

On March 12, 1917, the motion was argued by Mr. H. T. Newcomb, for the claimant, and Mr. Seth Shepard, Jr., for the defendants, and the motion was submitted.

On April 2, 1917, the Court filed an order overruling claimant's motion for a new trial and allowing motion to amend findings, and filed an additional Finding as No. X, with an opinion by Downey, J.

Said additional Finding X and opinion are as follows:

54 VII. *Additional Finding X and Opinion by Downey, J.*

On plaintiff's motion for a new trial and for amendment of the findings of fact it is ordered by the court that the findings of fact be amended by inserting therein an additional finding numbered X, as follows:

X.

On December 30, 1913, Attorneys Lyon & Lyon, of Washington, D. C., acting for and in behalf of the administrator de bonis non cum testamento annexo of the estate of Edmund Dwight, deceased, late of Boston, Massachusetts, filed with the Commissioner of Internal Revenue an application or claim for a refund of taxes paid to the United States in respect of legacies passing under the will of said decedent, included in which was the tax of $3,026.69 here in question.

This claim was rejected by letter of the Acting Commissioner of Internal Revenue on March 28, 1914, to Lyon & Lyon, in which he said:

"* * * this tax was paid upon the absolutely vested interest of a stranger amounting to more than $25,000 and taxed at the legal

rate of $7.50 per $100, and accordingly, under the decision of the Supreme Court in the Knowlton and Fidelity Trust cases, all this tax was legally due."

On the same day the same acting commissioner, in a letter addressed to Newcomb & Frey, as "Attorneys for the estate of Edmund Dwight," of which firm H. T. Newcomb who filed the claim set out in finding IX was the senior member, disallowed that claim in the same language as that quoted above.

The findings as thus amended will stand as the findings of fact and it is ordered that the motion otherwise be overruled.

Opinion.

DOWNEY, *Judge*, delivered the opinion of the court:

The plaintiff moves for a new trial and for amendment of the findings of fact on the ground that the judgment of the court dismissing the claimant's petition was for causes which operated as a surprise. With and as a part of the motion, plaintiff's counsel now submit a stipulation, supported by affidavits, with reference to
55 the filing of a claim with the Commissioner of Internal Revenue on the 30th of December, 1913, by attorneys representing the administrator de bonis non cum testamento annexo of the estate of Edmund Dwight deceased, and ask a finding showing the filing of that claim and the action of the Commissioner of Internal Revenue thereon. It is said, in effect, that plaintiff was misled by the fact that its originally submitted request for a finding that a claim had been filed and disallowed was indicated by defendant's counsel as not objected to.

Under the circumstances the court has concluded that the plaintiff ought to have the benefit of a finding as to the filing of said claim by the administrator de bonis non, and the stipulation of counsel, with supporting affidavits, is accepted as sufficient proof of the fact, though it does not bring before us the claim itself, and the additional finding, numbered X, is incorporated in the findings of fact. Counsel also asks that the findings show that the claim set up in finding IX was considered on its merits and rejected on the ground that the tax was held to have been lawfully and properly collected. We have met this request by a paragraph in the additional finding X, showing the exact terms in which the claim set up in finding IX was disallowed. The motion for amendments of the findings is in all other respects with reference to matters which were included in the original request for findings, and which have already received the attention of the court, and in these respects we see no occasion for modifying the findings as made.

In the opinion of the court the filing of the claim by the administrator de bonis non does not, under the facts shown, furnish any better basis for the prosecution of this action by this plaintiff in her own right than did the claim filed by the New England Trust Co., and extended discussion is deemed unnecessary. Further, it would

seem that in fact this administrator, when this claim was filed, could have had no right to the money had the Commissioner of Internal Revenue found that the tax had been illegally assessed; no authority in him to file a claim for this plaintiff is shown, and he was in no legal sense her fiduciary. The pecularity is now noted that the claim to this money filed by the New England Trust Co. and set up in Finding IX, and the claim by the administrator de bonis non of the estate of Edmund Dwight, set up in the additional Finding X, were both pending before the Commissioner of Internal Revenue at the same time, while this action is by neither but is by the person who in reality paid the tax, as shown by the facts found, and who is apparently the only person entitled to its recovery, if recovery is to be had at all.

The motion for new trial is overruled.

56 VIII. *Claimant's Application for and Allowance of Appeal*

From the judgment rendered in the above-entitled cause on the 2nd day of April, 1917, in favor of the Defendants, the claimant, by her attorneys, on the 28th day of May, 1917, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

NEWCOMB & FREY,
Attorneys for Claimant.

Filed May 28, 1917.

Ordered that the appeal be allowed as prayed for.
May 28, 1917.

By the COURT.

IX. *Further Proceedings.*

On June 4, 1917 the claimant filed a motion to include in record on appeal certain requested findings of fact, which motion was overruled by the Court on June 4, 1917.

57 In the Court of Claims.

No. 32970.

JENNIE LATHROP RAND

vs.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the judgment of the Court;

of the additional finding filed by the Court with opinion thereon; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this — day of June, A. D., 1917.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 25,011. Court of Claims. Term No. 544. Jennie Lathrop Rand, appellant, vs. The United States. Filed June 20th, 1917. File No. 26,011.

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 213

JENNIE LATHROP RAND,
Appellant,

vs.

THE UNITED STATES.

MOTIONS FOR CERTIORARI FOR DIMINUTION OF RECORD (RULE 14) AND TO REMAND FOR ADDITIONAL FINDINGS OF FACT AND BRIEF IN SUPPORT OF MOTIONS.

H. T. NEWCOMB,
Attorney for Appellant.

FREDERICK L. FISHBACK,
Of Counsel.

Rand Brothers, Law Job Printing Office, Inc., 154 Fulton St., N. Y.

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Supreme Court of the United States.

OCTOBER TERM, 1917.

JENNIE LATHROP RAND, Appellant, vs. THE UNITED STATES.	Number 544.

MOTIONS FOR CERTIORARI FOR DIMINUTION OF RECORD (RULE 14) AND TO REMAND FOR ADDITIONAL FINDINGS OF FACT.

Comes now the said Jennie Lathrop Rand, by H. T. Newcomb, her counsel, and suggests diminution of the record in this cause and respectfully represents:—

1. That there is now pending in this Court, on appeal from the Court of Claims of the United States, a suit in which your petitioner is appellant and the United States are the appellees, in which the said appellant brought suit against the United States, in said Court of Claims, to recover from the appellees a sum in excess of $3,000 which your petitioner then claimed and now claims that she is entitled to recover in said suit.

2. That appellant's said appeal was docketed in this Court during the October, 1917, term.

3. That the proceedings in said Court of Claims included certain requests to find facts, hereinafter fully set forth, which the said appellant considered to have been proven by competent evidence and deemed material to the due presentation of her said case in the findings of fact. That said requests were submitted before trial in accordance with Rule 5 of this Court and in the form and manner prescribed by said Court of Claims.

4. That said proceedings included a motion for a new trial and amendment of the findings of fact (*R. 45*) which said motion included certain requests to find facts, hereinafter fully set forth, which said appellant considered to have been proven by competent and uncontradicted testimony and deemed material to the due presentation of her said case in the findings of fact.

5. That the said proceedings included a motion, hereinafter fully set forth, to include in the record on appeal certain requested findings of fact, which said motion was overruled and denied (*R. 47*).

6. That certain of said requests for findings of fact were denied and said denied requests and the rulings of said Court of Claims thereon and said motion to include in the record on appeal certain requested findings of fact have not been certified to this Court as a part of the record of said proceeding and that there is a diminution of the record by the omissions aforesaid:

WHEREFORE, the said appellant:

A. Moves the Court, under Rule 14, to award a writ of *certiorari* to be issued and directed to the Chief Justice and the Judges of said Court of Claims, commanding them that, searching the record and proceedings in said cause, they forthwith certify to

this Court those parts of the said record so omitted as aforesaid.

B. Moves the Court to remand this cause to said Court of Claims with directions to find upon the evidence in said proceeding:—

1. Whether or not interest rates are different at the same time and on the same kind and grades of security in different portions of the United States, and those obtained upon different kinds and grades of investments and from loans upon different kinds and grades of security are different in the same places at the same time, and there are also differences as between periods of time, other conditions being substantially identical?

2. Whether or not around New York the rate of interest earned by trust funds is much lower than in the West?

3. Whether or not actual expectancies of life vary with race, age, sex, occupation, place of residence, condition of health and habits?

4. Whether or not four (4) per centum per annum was a lower rate of discount than it was reasonable to assume, at any time in the year 1900, could be obtained should the petitioner then undertake to dispose of or to anticipate her expected income from the trust fund?

5. Whether or not the valuation of $40,355.91, assigned to the interest of the appellant, by the Commissioner of Internal Revenue, in pursuance of the general rule of assessment set forth in finding V, made by said Court of Claims (*R. 28-29*), was too high and was greater than the clear value or actual value of the interest of the petitioner?

6. Whether or not interests such as that bequeathed to the appellant are salable, when such sales are not prohibited by law or by the terms of particular wills, and there are persons who make a business of buying them and to reduce such transactions to a business basis it is necessary to make allowances for many different elements of risk and to insure against as many of them as possible and to make extensive and costly inquiries as to the facts and the law?

7. Whether or not there is a general market for such interests and those who purchase commonly exact very high rates of interest on their money and commissions in addition to interest?

8. Whether or not a fair price, in such a purchase, for the interest of the appellant would have been $15,000?

And the said appellant respectfully represents further:

1. That the following is a certified copy of the requests for findings of fact referred to in the third numbered paragraph on page 2 herein:

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

No. 32,970.

JENNIE LATHROP RAND

vs.

THE UNITED STATES.

CLAIMANT'S REQUEST FOR FINDINGS.

The claimant, considering the facts hereinafter set forth to be proven, deeming them material to the true presentation of this case in the findings of fact, requests the court to find the same as follows:

I.

Jennie Lathrop Rand is a citizen of the United States and of the State of Massachusetts residing in Cambridge, Mass., and is the Mrs. Jennie Lathrop Rand named in the last will and testament of Edmund Dwight, deceased, late of Boston in said State. She brings this suit in her own right (*R. 75–7*).

II.

On June 6, 1900, Edmund Dwight, a citizen of the United States and of the State of Massachusetts, and a resident of Boston, Mass., died, leaving a last will and testament which was duly admitted to probate and record on June 28, 1900, in the Probate Court for the County of Suffolk in Massachusetts, that court having jurisdiction (*R. 21*). That the said last will and testament contained the following:—

> "I give to the New England Trust Company, a corporation duly chartered by the State of

Massachusetts, and located in the City of Boston, the sum of One hundred and twenty-five thousand dollars ($125,000) to be invested in the General Trust Fund of the company, and held upon the following trusts:

"To pay to Mrs. Jennie Lathrop Rand, now living at forty-nine Kirkland Street Cambridge the annual net income thereof in semi-annual payments during her life; after her death to pay said annual net income to such one or more of her three children Margaret Arnold, Henry Lathrop and Edward Lathrop, as shall survive her, and as she shall appoint by her last will or by other instrument in writing signed by her and attested by three witnesses. By the said appointment the said Jennie may dispose of the said annual net income among her said surviving children in such manner and proportions as she shall deem best: but she shall have no power to appoint any part of said annual net income to any such child for a term longer than the life of such child. In default of such appointment or at my death, if the said Jennie should die before me, the said annual net income shall be paid in equal shares to the said Margaret and Henry so long as they both shall live; on the death of either of them, or if, on the death of the said Jennie, or at my death after the death of the said Jennie, only one of them be living, then to the survivor during his or her life; on the death of the survivor, or if on the death of the said Jennie or at my death after the death of the said Jennie, both said Margaret and Henry be deceased, then to the said Edward for his life—I desire that any of the income of the fund hereinbefore given which may be paid to the said Margaret shall be paid to her for her sole and separate use, free from the interference or control of any husband she may marry.

"After the death of the last survivor of the said Jennie, Margaret, Henry and Edward, I direct that said fund be paid to the President and Fellows of Harvard College to be used by them principal and interest, as they shall think best for the benefit of the University and this Trust shall then terminate." (*R. 23-4*).

III.

On October 1, 1900, the trust fund of $125,000.00 was deposited with the New England Trust Company (*R. 71*), the trustee designated in the will (*R. 23*), which accepted the trust (*R. 23*), under an agreement by which interest thereon did not begin to run until December 1, 1900 (*R. 71, 72*). Payments of income from this fund have been made (*R. 71, 76-7*) to Mrs. Rand in the sums and on the dates set forth below:—

Date of payment.	Amount of payment.
January 1, 1901	$390.63
July 1, 1901	2,343.75
January 1, 1902	2,343.75
July 1, 1902	2,343.75
January 1, 1903	2,343.75
July 1, 1903	2,343.75
January 1, 1904	2,343.75
July 1, 1904	2,343.75
January 2, 1905	2,187.50
July 7, 1905	2,187.50
January 1, 1906	2,187.50
July 7, 1906	2,187.50
January 1, 1907	2,187.50
July 6, 1907	2,187.50
January 1, 1908	2,187.50
July 8, 1908	2,187.50
January 1, 1909	2,187.50
July 1, 1909	2,187.50
January 1, 1910	2,187.50
July 1, 1910	2,343.75
January 2, 1911	2,343.75
July 1, 1911	2,343.75
January 1, 1912	2,500.00
July 1, 1912	2,500.00
January 1, 1913	2,500.00
July 1, 1913	2,500.00
January 1, 1914	2,500.00
July 1, 1914	2,497.50
January 1, 1915	2,187.50

No other payments out of or on account of this trust or out of the estate of Edmund Dwight, deceased, were made to Mrs. Rand or for her benefit from the date of the decease of Edmund Dwight to April 16, 1915, nor did she become entitled during that period to any other or additional payments to her or for her benefit out of the said estate or the said trust (*R. 71, 77*).

IV.

On September 28, 1900 (*R. 40*), the Collector of Internal Revenue demanded and collected the sum of $3,026.69 (*R. 40*), which sum was provided for that purpose by Mrs. Rand (*R. 75-6, 81-3*), alleging that a tax of that amount had been lawfully assessed on account of the interest of Mrs. Rand in the estate of Edmund Dwight, deceased, and was due to the United States as a tax in accordance with the provisions of Sections 29 and 31 of the Act of Congress of June 13, 1898, and amendments (*R. 35-6, 39-41*). This sum of $3,026.69 was in the ordinary course of business of said Collector, turned over to the United States and is still retained by the United States (*R. 40, 41*).

V.

On December 16, 1898, the Commissioner of Internal Revenue promulgated and prescribed (*R. 77-81, 101-106*) an arbitrary general rule, or arbitrary general rules, of assessment known and designated as Treasury Decision No. 20442 and Treasury Decision No. 20443, which said arbitrary general rule, or rules, was thereafter applied to the interest of Mrs. Rand in the estate of Edmund Dwight, deceased, and to all like or similar interests, (*R. 35, 40*), which said rule, or rules, was in words and figures as follows:—

"Legacies in the nature of a life beneficiary interest and remaindermen's interest are both taxable.

The values of said interests are to be determined by approved tables, which have been prepared by the Government actuary. The tables referred to are published in this issue of Treasury Decisions, as decision No. 20443.

"Legacy taxes are not payable until the legacy is payable, and the legacy must not be paid until the tax shall have been paid.

"N. B. SCOTT, *Commissioner.*"

"[Series 7, No. 8—Revised, Supplement No. 1. United States Internal Revenue.]

"*Tables showing the present worth of an annuity, life interest, and of a reversionary interest, with instructions for the use thereof in the computation of tax on legacies and distributive shares.*

"(December 16, 1898. Washington: Government Printing Office. 1898.)

"[Series 7, No. 8—Revised, Supplement No. 1. United States Internal Revenue.]

"Instructions concerning the tax on legacies and distributive shares.

"TREASURY DEPARTMENT,
"OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
"*Washington, D. C., December 16, 1898.*

"The following tables, showing the present worth of an annuity, life interest, and of a reversionary interest, with explanatory notes and examples, are hereby published and promulgated for the use of internal-revenue officers and administrators, executors, or trustees in determining the duty or tax to be paid to the United States upon legacies or distributive shares arising from personal property, imposed by the act of June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes.'

"N. B. SCOTT, *Commissioner.*

"Approved:
"O. L. SPAULDING,
"*Acting Secretary of the Treasury.*"

"LEGACY TAXES.—*Table, single-life, 4 per cent, showing the present worth of an annuity, or life interest, and of a reversionary interest, with explanatory notes and examples.*

[United States Internal-Revenue Adjustment, 1898.]

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Revision, or present value of one dollar due at the end of the year of death of a person of specified age.
10	38.891	$19.45359	$0.21332
11	38.507	19.36943	0.21656
12	38.113	19.28184	0.21993
13	37.710	19.19065	0.22344
14	37.298	19.09590	0.22708
15	36.877	18.99764	0.23086
16	36.447	18.89569	0.23478
17	36.010	18.79010	0.23884
18	35.565	18.68070	0.24305
19	35.113	18.56751	0.24740
20	34.652	18.45038	0.25191
21	34.186	18.32932	0.25656
22	33.711	18.20416	0.26138
23	33.230	18.07471	0.26636
24	32.742	17.94097	0.27150
25	32.248	17.80274	0.27682
26	31.747	17.65984	0.28231
27	31.239	17.51224	0.28799
28	30.725	17.35968	0.29386
29	30.205	17.20225	0.29991
30	29.678	17.03961	0.30617
31	29.147	16.87176	0.31262
32	28.608	16.69846	0.31929
33	28.067	16.51964	0.32617
34	27.516	16.33503	0.33327
35	26.961	16.14437	0.34060
36	26.401	15.94755	0.34817
37	25.834	15.74427	0.35599
38	25.263	15.53421	0.36407
39	24.685	15.31722	0.37241
40	24.101	15.09295	0.38104
41	23.511	14.86102	0.38996
42	22.915	14.62122	0.39918
43	22.313	14.37356	0.40871
44	21.708	14.11860	0.41852
45	21.103	13.85713	0.42857
46	20.499	13.58958	0.43886
47	19.896	13.31698	0.44935
48	19.298	13.03942	0.46002
49	18.703	12.75716	0.47088
50	18.113	12.47032	0.48191

"LEGACY TAXES.—*Table, single-life, 4 per cent, showing the present worth of an annuity, or life interest, and of a reversionary interest.*—Continued.

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Revision, or present value of one dollar due at the end of the year of death of a person of specified age.
51	17.527	$12.17919	$0.49311
52	16.947	11.88408	0.50446
53	16.372	11.58531	0.51595
54	15.804	11.28325	0.52757
55	15.243	10.99789	0.53931
56	14.689	10.66982	0.55116
57	14.143	10.35931	0.56310
58	13.603	10.04630	0.57514
59	13.072	9.73131	0.58726
60	12.549	9.41474	0.59943
61	12.029	9.09765	0.61163
62	11.532	8.78052	0.62382
63	11.039	8.46412	0.63600
64	10.557	8.13888	0.64812
65	10.088	7.83552	0.66017
66	9.630	7.52476	0.67212
67	9.185	7.21699	0.68396
68	8.753	6.91298	0.69565
69	8.333	6.61301	0.70719
70	7.926	6.31716	0.71857
71	7.532	6.02612	0.72976
72	7.151	5.74003	0.74077
73	6.782	5.45928	0.75157
74	6.425	5.18402	0.76215
75	6.081	4.91463	0.77251
76	5.749	4.65125	0.78264
77	5.428	4.39383	0.79254
78	5.119	4.12486	0.80220
79	4.823	3.89858	0.81159
80	4.537	3.66071	0.82074
81	4.262	3.42900	0.82965
82	3.995	3.20258	0.83836
83	3.737	2.98024	0.84691
84	3.484	2.76106	0.85534
85	3.236	2.54366	0.86371
86	2.992	2.32795	0.87200
87	2.752	2.11384	0.88024
88	2.517	1.90115	0.88842
89	2.286	1.69107	0.89650
90	2.062	1.48549	0.90441
91	1.845	1.28432	0.91214
92	1.637	1.09024	0.91961
93	1.442	0.90647	0.92667
94	1.263	0.73687	0.93320
95	1.103	0.58435	0.93906
96	0.975	0.46182	0.94378
97	0.877	0.36698	0.94742
98	0.746	0.24038	0.95229
99	0.500	0.00000	0.96154

"Example 1: A person dying bequeaths to his nephew, aged forty years, an annuity of one thousand dollars during life. What is the present value of the annuity?

"Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged forty years, is fifteen dollars nine cents two mills and ninety-five one-hundredths of a mill ($15.09295); therefore, the present value of one thousand dollars is one thousand times as much, or fifteen thousand and ninety-two dollars and ninety-five cents, the amount upon which tax accrues.

"Example 2: A person dying bequeaths to his daughter, aged thirty-five years, a life interest in personal property amounting to fifty thousand dollars ($50,000), the estate to revert absolutely at her death to other parties. Required the present value, at the date of death of the testator, of the life interest of the daughter in the estate; also, required at the same date, the present value of the reversionary interest of said other parties in the estate.

"At a net interest of four per cent per annum, the assumed rate, the estate of $50,000 will realize an income or annuity of $2,000 per annum. The present value of the sum of $1.00, payable at the end of each year during the life of a person aged thirty-five years, is found by the table to be $16.14437, and the present value of an annuity of $2,000 for the same time would be two thousand times as much, or $32,288.74, the amount upon which tax accrues.

"The reversion or present value of $1.00, due at the end of the year of death of a person aged thirty-five years, is found by the table to be $0.34060, and such value of $50,000 would be fifty thousand times as much, or $17,030, the amount upon which tax accrues.

"NOTE.—This table is based on the 'Actuaries' or 'Combined Experience Table,' money being worth 4 per cent per annum.

"The first column shows the age of the person under consideration.

"The second column shows the corresponding 'mean redemption period' and represents the time in years in which the present values of annuities

and reversions certain will become equal, respectively, to the present values of annuities and reversions contingent on the duration of life.

"The 'mean redemption period' is a mean between the last payment of the annuity and the payment of the reversion, averaging six months later than the former payment and six months earlier than the latter payment.

"The third column shows the present value of an annuity for life of one dollar per annum, the last payment being made at the end of the year prior to the one in which death occurs.

"The fourth column shows the present worth of one dollar payable at the end of the year in which death occurs.

"NOTE.—This adjustment has been prepared under the direction of Mr. J. S. McCoy, Government actuary.

" Present value of annuities and reversions certain upon a 4 per cent. basis.

Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.
1	$0.96154	$0.961538
2	1.88609	0.924556
3	2.77509	0.888996
4	3.62989	0.854804
5	4.45182	0.821927
6	5.24214	0.790314
7	6.00205	0.759918
8	6.73274	0.730690
9	7.43533	0.702587
10	8.11089	0.675564
11	8.76047	0.649581
12	9.38507	0.624597
13	9.98565	0.600574
14	10.56312	0.577475
15	11.11839	0.555265
16	11.65229	0.533908
17	12.16567	0.513373
18	12.65929	0.493628
19	13.13394	0.474642
20	13.59032	0.456387
21	14.02916	0.438834
22	14.45111	0.421955
23	14.85684	0.405726
24	15.24696	0.390121
25	15.62208	0.375117
26	15.98277	0.360689
27	16.32958	0.346816
28	16.66306	0.333477
29	16.98371	0.320651
30	17.29203	0.308319

" Example: A man dies leaving personal property to the amount of $50,000, his daughter to have the income from it for 20 years; it then to revert to his youngest son. What is the present worth of these legacies?

" The income from $50,000 would be $2,000 per annum, assuming money at 4 per cent.

" The present worth of an annuity of $2,000 for 20 years will be 2,000 times an annuity of $1.00 for

20 years. In the table opposite 20 we find the value of an annuity of $1.00 to be $13.59032, therefore the present worth of an annuity of $2,000 will be $27,180.64.

"A reversion of $1.00 at the end of 20 years is shown by the table to be $0.456387, and a reversion of $50,000 will be 50,000 times as much or $22,819.35."

VI.

The aforesaid arbitrary general rule, or rules, of assessment included, as a fundamental element which had a controlling effect in determining the amount of the tax assessed in each instance in which it was applied, the arbitrary assumption that all trust funds included in legacies taxable under the Act of June 13, 1898, would produce for the beneficiaries entitled to the income thereof precisely four per centum per annum of their principal amounts (*R. 34–36, 43, 59, 60, 66, 68, 101–6*).

VII.

Interest rates are different at the same time and on the same kinds and grades of security in different portions of the United States and those obtained from different kinds and grades of investments or from loans upon different kinds and grades of security, are different in the same places at the same time and there are also differences as between different periods of time, other conditions being substantially identical (*R. 43, 73–5, 89, 95*). Trust funds, owing to the high degree of security required produce less than the average rate of interest (*R. 43*). Around New York the rate of interest earned by trust funds is much lower than in the West (*R. 43*). The average interest earned by trust funds throughout the entire country during the period from June 13, 1898, to January 1, 1901, was from three and one-half to four per centum per annum (*R. 43, 69, 71, 72*).

VIII.

The aforesaid arbitrary general rule, or rules, of assessment included, as a fundamental element which had a controlling effect in determining the amount of the tax assessed in each instance in which it was applied, the arbitrary assumption that all future payments could be discounted at the rate of four per centum per annum (*R. 34-6, 50-2, 54, 57, 88, 94*). Discount is just the reverse of interest and the discount of a dollar to be received in the future is the difference between one dollar and the present value of the anticipated payment (*R. 88*). Lower rates of discount produce higher present values and higher rates of discount produce lower present values (*R. 50-2, 54, 57, 95*). The rule assigned a value of $\$8.46\frac{412}{1000}$ to an annuity of one dollar payable during the life of a person sixty-three years of age (*R. 36, 52, 55, 78, 87*); if three per centum instead of four per centum had been used as the rate of discount the value assigned to such an annuity would have been approximately $\$9.09\frac{8}{10}$; if five per centum had been used, $\$7.90\frac{8}{10}$; if six per centum had been used, $\$7.40\frac{3}{10}$; if seven per centum had been used, $\$6.95\frac{5}{10}$; if eight per centum had been used $\$6.65\frac{3}{10}$ (*R. 95*).

IX.

The aforesaid arbitrary general rule, or rules, of assessment included, as a fundamental element which had a controlling effect in determining the amount of the tax assessed in each instance in which it was applied, the arbitrary assumption that whenever one of the elements affecting the value of a legacy was the expectancy of life of any individual that particular individual had an expectancy of life equivalent to the average of the lives represented in certain selected mortality tables (*R. 36, 44-50, 88, 94*). These

selected mortality tables contained only one series of expectancies of life which was to be applied and was applied indiscriminately to persons in all conditions of health, of both sexes, of all occupations and all races and wherever resident (*R. 101-6*). Different mortality tables showing different expectancies of life have been prepared upon different bases of experience (*R. 48, 86-8, 91-2, 94, 96-9*). Different tables showing different expectancies have been approved by different State legislatures (*R. 48*). There is disagreement as to which is best (*R. 48, 88, 92*). A mortality table is the means by which probabilities of life and death are measured and is used to determine the value of human contingencies (*R. 49, 86*) for the purposes of life insurance companies (*R. 46, 86*) and other undertakings depending upon such contingencies (*R. 86*). Results obtained from a large number of individuals reduce the uncertainties as to particular individuals to substantial certainties as to the mass (*R. 49, 92*). To insure a single life only would be gambling (*R. 92*). Life insurance contracts were at one time considered to be wagering contracts and they differ from gambling only in the fact that by taking a large number of risks the element of chance is eliminated (*R. 53, 92*). The term "expectancy of life" means the average number of years of life beyond the age as to which it is stated that the records show to have been enjoyed by the persons represented in the records from which it is derived (*R. 48-9, 91, 97-8*). The chances at any given age of a particular individual living a shorter period or a longer period than his expectancy of life at that time are not equal (*R. 48-9, 91*). The chance at any given age that any individual will live exactly his expectancy of life at that time is very remote (*R. 49-50*). To state the expectancy of life of a particular individual is not to make any assertion whatever as to the number of years that person will live (*R. 92*). Many persons have shorter expectancies of life than those shown by the mortality tables (*R. 44-5,*

92-4). There are many applicants for insurance whom the life insurance companies refuse to insure because their health is impaired or for other reasons their expectancies of life are below the averages shown by the mortality tables (*R. 45-6, 92-4*) and expectancies of life vary with race, age, sex, occupation, place of residence and habits (*R. 45-6, 92-3, 98-9*). The underlying principles of life insurance and annuities are very similar and both are dependent upon chances of the same class, involving risks of the same class of uncertainty (*R. 93*).

X.

The "present value" of $\$8.46\frac{412}{1000}$ assigned by the aforesaid arbitrary general rule, or rules, of assessment, to the right to receive one dollar at the end of each year of the life of a person sixty-three years of age (*R. 51, 52, 78, 104*) and applied to the interest of the Petitioner by the Commissioner of Internal Revenue for the purpose of determining the amount which was claimed and collected as aforesaid (*R. 36*) is the sum of money, mathematically calculated at the assumed rate of interest of four per centum per annum, which if set aside at the beginning of the period during which the annuity would be received, if the annuitant should live exactly to the end of his or her expectancy of life, and no longer, would enable the annual payments to be regularly made out of the principal and income thereof and would be wholly consumed when the last such payment was made (*R. 97-8*).

XI.

The only assessment ever made or claimed to have been made of any tax under the provisions of sections 29 and 31 of the Act of Congress of June 13, 1898, and amendments, upon or in respect of the interest of Mrs. Rand in the estate of Edmund Dwight, deceased, was made in pursuance of the

aforesaid arbitrary general rule, or rules, of assessment that was promulgated and prescribed on December 16, 1898, (*R. 35, 36, 101-6*). Disregarding the facts conditioning and determining the actual or clear value of the interest of the Petitioner, the amount of said assessment was arbitrarily determined in accordance with the said general rule or rules in the manner following, to wit:

A. It was assumed, as required by said general rule or rules, that the trust fund was established immediately upon the death of the testator and that the income therefrom commenced immediately, that is to say on or about June 6, 1900, to accrue to and for the use and benefit of the Petitioner (*R. 36*).

B. It was assumed, as further required by said general rule or rules, that the trust fund would produce an annual income amounting to four (4) per centum of the full amount thereof, that is to say, that, as the amount of the said trust fund was One Hundred and Twenty-Five Thousand Dollars ($125,000.00), it was assumed that an annual income of Five Thousand Dollars ($5,000.00) would accrue therefrom to the use and benefit of the Petitioner (*R. 36, 79*).

C. It was assumed, as still further required by said general rule or rules, that the whole income expected thereafter to accrue to the use and benefit of the Petitioner, on account of and from the trust fund, during the whole period of her life, was discountable for cash on June 6, 1900, at the discount rate of four (4) per centum per annum for all future payments and on the basis of the expectancy of life of persons of Petitioner's age, on said June 6, 1900, as indicated by selected mortality tables (*R. 36, 77-81, 101-6*).

D. Relying upon the foregoing assumptions, and as the Petitioner was Sixty-Three (63) years of age on June 6, 1900, the Commissioner of Internal Revenue multiplied the present worth of the right of a person of said age to receive the sum of One Dollar ($1.00) at the end of each year during life, as shown (on the basis of said assumed discount rate of four per centum per annum and the expectancy of life therein estimated) in the tables constituting a part of said pretended general rule, or rules, that is to say, the sum of Eight and 46,412-100,000 Dollars (8.46\frac{412}{1000}$) (*R. 36, 78, 104*) by Five Thousand (5,000) (*R. 36*) and obtained, as the product, the sum of Forty-Two Thousand, Three Hundred and Twenty and $\frac{60}{100}$ Dollars ($42,320.60) (*R. 36*). Deducting from this product the amount of a tax collected by the State of Massachusetts, that is to say, the sum of One Thousand, Nine Hundred and Sixty-Four and $\frac{69}{100}$ Dollars ($1,964.69) (*R. 36*), the Commissioner of Internal Revenue obtained Forty Thousand, Three Hundred and Fifty-Two and $\frac{91}{100}$ Dollars ($40,355.91) which he, thereupon, assumed to be the clear value of the interest of the Petitioner (*R. 36*).

E. Applying to Forty Thousand, Three Hundred and Fifty-Five and $\frac{91}{100}$ Dollars ($40,355.91), the rate of Seven and $\frac{50}{100}$ Dollars ($7.50) per One Hundred Dollars ($100.00) the Commissioner of Internal Revenue obtained the sum of Three Thousand and Twenty-Six and $\frac{69}{100}$ Dollars ($3,026.69), which he certified to the Collector of Internal Revenue for the Third District of Massachusetts as the amount of the said pretended tax which he claimed to have assessed against the interest of the Petitioner (*R. 40*).

XII.

Claim, in accordance with the Act of Congress of July 27, 1912 (*37 Stat. 240*), and the regulations of the Treasury Department, for the whole amount

demanded and collected, as aforesaid, was filed with the Commissioner of Internal Revenue on December 24, 1913, and was rejected and disallowed on March 27, 1914, (*R. 41*) and this suit was brought within two years thereafter (*R. 1*).

XIII.

Four (4) per centum or $5,000.00 per annum was an higher rate of income than the trust fund provided in part for the benefit of the Petitioner by the last will and testament of her testator has actually earned and was an higher income than that fund could reasonably have been expected, at the time it was established, to produce and the use of this rate and amount produced an estimate of the Petitioner's probable income from the trust fund that was unreasonable and excessive. (*R. 43, 69, 71, 72, 73, 76-7*).

XIV.

Four (4) per centum per annum was a lower rate of discount than it was reasonable to assume, at any time in the year 1900, could be obtained should the Petitioner then undertake to dispose of or to anticipate her expected income from the trust fund (*R. 63-7, 73-4, 95*).

XV.

The valuation of $40,355.91, assigned to the interest of the Petitioner by the Commissioner of Internal Revenue, in pursuance of the arbitrary general rule, or rules, of assessment, was too high and was greater than the clear value or actual value of the interest of the Petitioner and resulted in an erroneous and illegal assessment of an excessive tax (*R. 66-9, 73-4, 95*).

XVI.

Interests such as that bequeathed to the Petitioner are salable when such sales are not prohibited by

law or by the terms of particular wills, and there are persons who make a business of buying them (*R. 60-1*). To reduce such transactions to a business basis it is necessary to make allowances for many different elements of risk and to insure against as many of them as possible (*R. 63-5, 90-1*), and to make extensive and costly inquiries as to the facts and the law (*R. 65*). There is no general market for such interests (*R. 95*) and those who purchase commonly exact very high rates of interest on their money and commissions in addition to interest (*R. 66*). A fair purchase price for the interest of the Petitioner would have been $15,000 (*R. 66-7*). To purchase a single interest, like that of the Petitioner, and to have paid $43,570 for her said interest would have been a gambling transaction (*R. 95*).

XVII.

The clear and actual value of the interest of the Petitioner in the estate of Edmund Dwight, deceased, did not in fact exceed $15,000 (*R. 66*).

XVIII.

No lawful assessment of any tax under or in accordance with Sections 29 and 31 of the Act of Congress of June 13, 1898, and amendments, upon or in respect of the interest of the Petitioner, was ever made and the sum of $3,026.69 demanded and collected, as aforesaid, was erroneously and illegally assessed and collected.

XIX.

The amount of $3,026.69 is justly due and owing to the Petitioner from the United States.

I, SAMUEL A. PUTMAN, Chief Clerk of the Court of Claims, do hereby certify that the foregoing printed pages one to eighteen, inclusive, constitute a true copy of claimant's request for findings of

fact, filed in the above entitled cause in said Court before the trial thereof.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at Washington, D. C., this 25th day of January, A. D., 1918.

(signed) SAMUEL A. PUTMAN
(SEAL) Chief Clerk,
Court of Claims.

2. That the following is a certified copy of the motion for new trial and requests for findings of fact referred to in the fourth numbered paragraph on page 2, herein:

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

No. 32,970.

JENNIE LATHROP RAND

v.

THE UNITED STATES.

MOTION FOR NEW TRIAL.

Now comes the claimant in this cause, by Newcomb & Frey, her attorneys, and moves the Court for a new trial and for amendment of the Court's findings of fact filed on January 8, 1917, for the following reasons, all of which are respectfully submitted:

1. The judgment of the Court dismissing the claimant's petition was for causes that operated as a

surprise and under the circumstances of the case could not have been anticipated (*King* v. *United States, 31 C. Cls. 304; Jones* v. *United States, 35 C. Cls. 36; Claimant's twelfth requested finding, R. 126, and defendants' acceptance thereof, R. 164; Report of Acting Commissioner Williams, November 19, 1914, R. 40-1*).

2. Prior to and at the time of the trial of this case and until the Court's judgment dismissing the claimant's petition, certain facts which could have been proved were not considered or understood, either by the claimant or her attorneys or by the defendants, to be material or necessary to a correct and just determination of this case (*Claimant's twelfth requested finding of fact, R. 126, and defendants' acceptance thereof, R. 164; Affidavit of H. T. Newcomb, filed herewith; Claimant's and defendants' briefs and opinion of the Court; Johnson* v. *United States, 15 C. Cls. 62*).

3. In support of both the foregoing, the claimant now offers to prove and asks to be permitted to prove and, if permitted by the Court, can prove the presentation of a claim to the Commissioner of Internal Revenue by the duly appointed, qualified and acting administrator, *de bonis non cum testamento annexo*, of the estate of the claimant's testator, the said Edmund Dwight, deceased, under the Act of July 27, 1912, for the payment in this suit sought to be enforced and the rejection of said claim by the Treasury Department (*See stipulation of counsel and affidavits of Simon Lyon and H. T. Newcomb, filed herewith*).

4. The Court erred in denying the sufficiency of the claim set forth in finding IX when supplemented by action thereon as upon the merits (*R. 36, 41*) to confer upon the Court jurisdiction of petitioner's suit

(*First National Bank of Greencastle* v. *United States, 15 C. Cls. 225*; *Woolner* v. *United States, 13 C. Cls. 355* ; *Barnett* v. *United States, 16 C. Cls. 515*; *Dunnegan* v. *United States, 17 C. Cls. 247*; *Nixon* v. *United States, 18 C. Cls. 448*; *Sybrant* v. *United States, 19 C. Cls. 461*; *Wayne* v. *United States, 26 C. Cls. 274, 289-90*).

5. The Court erred in holding protest against the payment herein sought to be recovered to be essential to a right of recovery in this cause (*United States* v. *Jones, 236 U. S. 106, 109*; *United States* v. *Hvoslef, 237 U. S. 1*).

6. The Court erred in dismissing the claimant's petition and in not rendering judgment for the claimant in the full amount claimed and sought to be recovered (*See argument in claimant's original and reply briefs, R. 128-58, 193-204*).

7. In view of the facts and circumstances set forth above, the findings of fact should be amended to show the presentation and rejection of the claim of the said administrator, *de bonis non cum testamento annexo*, such amendment to be made either upon the stipulation of counsel filed herewith, or upon the evidence hereby offered to be produced and in the possession of the defendants, and upon the affidavits also filed herewith (*King* v. *United States, 31 C. Cls. 304, 307*; *Jones* v. *United States, 35 C. Cls. 36*; *Johnson* v. *United States, 15 C. Cls. 62*).

8. The findings of fact omit material facts, and in order that they shall fully present the questions of law involved in this case, the following amendments are respectfully requested:

A. Amend finding IX by omitting the last sentence thereof, which reads:

> "It is not shown that any claim for the refund of said amount, or any part thereof, was

ever filed with the Commissioner of Internal Revenue by the claimant, or by any other person acting for her or in her behalf."

B. Amend the findings by adding additional findings of fact, as follows:

X.

The claim set forth in finding IX was considered upon its merits and rejected on the single ground that the amount was held to have been lawfully and properly demanded and collected. (*Letter of March 28, 1914, from Acting Commissioner Fletcher to Newcomb & Frey, R. 36.*)

XI.

On December 30, 1912, claim in accordance with the Act of Congress of July 27, 1912 (*37 Stat. 240*), and the regulations of the Treasury Department, for the amount demanded and collected as hereinbefore set forth and in this suit sought to be recovered, was duly presented to the Commissioner of Internal Revenue on behalf of the duly appointed, qualified and acting administrator, *de bonis non cum testamento annexo* of the estate of the said Edmund Dwight, deceased, which claim was considered upon its merits and on March 27, 1914, rejected and disallowed. (*Stipulation of counsel filed, herewith*).

XII.

Interest rates are different at the same time and on the same kind and grades of security in different portions of the United States, and those obtained upon different kinds and grades of investments and from loans upon different kinds and grades of security are different in the same places at the same time, and there are also differences as between periods of time, other conditions being substantially identical (*R. 43, 73-5, 89, 95*). Around New York the rate of interest earned by trust funds is much lower than in the West (*R. 43*).

XIII.

Actual expectancies of life vary with race, age, sex, occupation, place of residence, condition of health and habits (*R. 45-6, 92-3, 98-9*).

XIV.

Four (4) per centum per annum was a lower rate of discount than it was reasonable to assume, at any time in the year 1900, could be obtained should the petitioner then undertake to dispose of or to anticipate her expected income from the trust fund (*R. 63-7, 73-4, 95*).

XV.

The valuation of $40,355.61, assigned to the interest of the petitioner, by the Commissioner of Internal Revenue, in pursuance of the general rule of assessment set forth in finding V, was too high and was greater than the clear value or actual value of the interest of the petitioner (*R. 66-9, 73-4, 95, 97-8*).

XVI.

Interests such as that bequeathed to the petitioner are salable, when such sales are not prohibited by law or by the terms of particular wills, and there are persons who make a business of buying them (*R. 60-1*). To reduce such transactions to a business basis it is necessary to make allowances for many different elements of risk and to insure against as many of them as possible (*R. 63-5, 90-1*) and to make extensive and costly inquiries as to the facts and the law (*R. 65*). There is no general market for such interests (*R. 95*) and those who purchase commonly exact very high rates of interest on their money and commissions in addition to interest (*R. 66*). A fair price, in such a purchase, for the interest of the petitioner, would have been $15,000 (*R. 66-7*).

(Signed) NEWCOMB AND FREY,
Attorneys for Claimant.
by H. T. NEWCOMB.

I, SAMUEL A. PUTMAN, Chief Clerk of the Court of Claims, do hereby certify that the foregoing printed pages one to five, inclusive, constitute a true copy of claimant's motion for a new trial, filed in the above entitled cause in said Court on February 6, 1917.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at Washington, D. C., this 25th day of January, A. D., 1918.

(signed) SAMUEL A. PUTMAN
Chief Clerk
Court of Claims.

(SEAL)

3. That the following is a certified copy of the motion to include in the record on appeal certain requested findings of fact referred to in the fifth numbered paragraph on page 2, herein:—

COURT OF CLAIMS OF THE UNITED STATES.

JENNIE LATHROP RAND, *vs.* THE UNITED STATES,
No. 32,970.

Comes now the claimant in this cause, by her attorneys, and moves the Court to direct the Clerk of the Court to include in, and as a part of, the transcript of record on appeal in this case the following of the claimant's requested findings of fact:

1. Of the claimant's requested findings filed May 10, 1916, all of requests numbered VII, XIV, XVI and XVII; and that part of request numbered IX reading: "expectancies of life vary with race, age, sex, occupation, place of residence and habits."

2. Of the claimant's requested findings contained in claimant's motion for a new trial and amendment of the findings of fact, filed February 6, 1917, the requested findings numbered XII, XIII, XIV and XVI.

The purpose of this motion is to so complete the appeal record as to show that findings of fact on the questions of fact involved in these requested findings were duly requested of this court by the claimants, in the event that the Supreme Court should consider findings of fact on such questions material or necessary to the consideration and determination of the questions of law involved in the case.

Respectfully submitted.

(signed) NEWCOMB & FREY,
Attorneys for Claimant.

Endorsements:

Filed
June 4, 1917
Court of Claims.

By court, June 11, 1917,
motion overruled.
E. K. C.

I, SAMUEL A. PUTMAN, Chief Clerk of the Court of Claims, do hereby certify that the foregoing is a true copy of claimant's motion to include in appeal record certain requested findings of fact, filed in the above-entitled cause in said court, June 4, 1917.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court at Washington, D. C., this 23rd day of January, A. D., 1918.

(Signed) SAMUEL A. PUTMAN.
(SEAL) Chief Clerk, Court of Claims.

4. That the affidavit of said H. T. Newcomb, counsel for said appellant, hereinafter following,

shows that the facts recited in the requests for findings of facts referred to in the fourth numbered paragraph on page 2, herein, and in the second numbered paragraph on page 23, herein, were supported by uncontradicted testimony in the said proceedings in said Court of Claims.

State, County and City of New York } ss

H. T. NEWCOMB, of the State, County and City aforesaid, being duly sworn according to law, deposes and says:—

a. That he is attorney for appellant in the suit of Jennie Lathrop Rand, appellant, *vs.* The United States, Number 544, now pending in the Supreme Court of the United States and had charge of her suit in the Court of Claims of the United States which is now the subject of said appeal.

b. That he was and is familiar with the entire record in said proceeding in said Court of Claims, including all the testimony therein offered and heard on behalf of said appellant and of said appellees, including the several reports therein rendered by the Treasury Department or the Commissioner of Internal Revenue.

c. That he has made diligent search and examination of all said testimony and all said reports and verily believes that each and every of the requested findings of fact requested in the motion for new trial filed in said Court of Claims on February 6, 1917, (*R. 45*), were fully supported by competent evidence and that said requested findings of fact were none of them contradicted in any respect by any testimony whatever heard in said proceeding.

d. That said requested findings of fact included all the matters and things with respect of which, by the motion now made, this Court is moved to inquire of said Court of Claims.

e. That affiant verily believes that all the matters and things in respect of which, by the motion now made, this Court is moved to inquire of said Court of Claims, are material and relevant in this proceeding and necessary to the true presentation of the cause of said appellant in the findings of fact.

(signed) H. T. NEWCOMB

Subscribed and Sworn to before me on this 8th day of April, 1918

(Signed) RAEBURN W. JENKINS
(SEAL) Notary Public
New York City

All of which is respectfully submitted.

H. T. NEWCOMB
Attorney for Appellant

FREDERICK L. FISHBACK
Of Counsel

22, April, 1918.

BRIEF IN SUPPORT OF THESE MOTIONS.

Outline of the Facts.

Appellant sued in the Court of Claims to recover the amount exacted as a tax claimed to be due to the United States, under the Act of June 13, 1898, commonly known as the Spanish War Revenue act (*30 Stat. 448, 464-5*), in respect of her interest in the estate of Edmund Dwight, deceased. This interest consisted of the right to receive, during her life, the income of a trust-fund of $125,000.00 (*R. 24-5*). On her death the income was to be disposed of in accordance with the will of her testator during the lives of three children of the appellant and after the death of the survivor among these beneficiaries the principal of the fund was to pass to Harvard College (*R. 24-5*).

The amount claimed and collected by the United States was determined in accordance with a general rule formulated and enforced by appellees, the essentials of this rule being (1) its general application irrespective of the special facts of particular cases, (2) the assumption that every such trust-fund must produce a yearly income of four per cent of its amount, (3) the assumption that the actual or clear value (for taxation purposes) of every such interest must be the equivalent of a sum which if presently set aside and invested at four per cent would produce the amount of every income payment to be made during the expectancy of life of the beneficiary and be wholly exhausted at his or her death, and (4) the assumption that every such beneficiary must have the particular expectancy of life indicated by certain selected mortuary tables (*R. 28-33*).

On these facts appellant contended in the Court of Claims, among other things, that her interest was

overvalued and an excessive amount exacted (even if such an interest was lawfully taxable) and that she was entitled to recover the portion of the tax in excess of that which would have been exacted upon a proper valuation (even if not entitled to recover the whole amount) (*R. 14*).

These questions were presented to the Court of Claims in briefs and argument (*R. 35*), but that Court conceived that the merits of appellant's claim were not properly presented in the suit and that its duty required the dismissal of her petition on certain technical grounds (*R. 35–45*). Nevertheless, the whole case, if properly presented in the findings of fact, is in this Court on the appeal and if, as appellant's counsel will at the proper time respectfully submit, the Court of Claims was in error in its view as to the technical obstacles to a consideration upon the merits, it will be essential to appellant that all the material facts should be fully presented in the findings of facts.

To that end these motions are respectfully submitted.

They are made together in order to conserve the time of the Court. It might have been more logical first to have offered the motion to complete the record and, having obtained that result, then to seek to remand for the needed findings, but such separation of necessary steps would have constituted a practical sacrifice to mere form, improvident of time and effort and unwarranted.

As to Certiorari for Diminution of Record.

Appellant is entitled to have this Court pass upon every question of law determined adversely to her by the trial court. Certain of the findings asked for were supported by competent and uncontradicted

evidence and refusal to find a matter thus supported is a proper subject for review on this appeal.

> "It is undoubtedly true, that if the Circuit Court neglects or refuses, on request, to make a finding one way or the other on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal taken in time and properly presented by a bill of exceptions may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found when in truth there was none. Both these are questions of law and proper subjects for review in an appellate court." *Duncan* v. *Steamship Francis Wright, 105 U. S. 381.* See, also, *Wright* v. *Bragg, 96 Fed. 729.*

Although there has been a change in the form of the rule since the decision in *United States* v. *Driscoll, 131 U. S. appx. CLIX*, rendered on April 8, 1878, the language used by Mr. Chief Justice Waite in that case is still significant.

> "At the same time with the order for additional findings in *United States* v. *Adams, 9 Wall. 661*, and to avoid the difficulty experienced in that case, rules 4 and 5, regulating appeals from the Court of Claims, were promulgated. The fourth requires that Court to file its finding of facts at or before the time of entering the judgment, and the fifth permits either party to call for a finding upon a special question deemed material to the judgment in the case, and, if refused, to ask this Court to pass upon the materiality of the fact alleged, and, should it be considered material, to send down for the finding. Such is the construction given

> the rules in *Mahan* v. *United States, 14 Wall. 112.* The object is to present the question here as upon an exception to the ruling of the Court below in respect to the materiality of the fact." *131 U. S. Appx. CLIX.*

In *Mahan* v. *United States, 14 Wall. 109*, this Court, speaking by Mr. Justice Miller, and with regard to the same rule, said:—

> "The remedial purpose of this rule is that when a party has, in writing, indicated a specific question of fact on which he desires the Court of Claims to make a finding, and the Court has neglected or refused to do so, this Court may be able to determine whether the question is one so necessary to the decision of the case that it will send it back for such finding" *14 Wall. 109.*

The alteration in the rule was clearly intended to simplify the procedure and reduce the record in the vastly preponderating number of cases in which the findings are sufficient for all purposes on appeal, not to modify the fundamental remedial purpose or to impair the efficiency of the remedy in the relatively rare instances in which remedy is required. It was never intended that the Court of Claims should pass finally upon any question as to the materiality of any requested finding. If that Court were permitted to make such a determination the statutory right of appeal might frequently be nullified. *United States* v. *Pugh, 99 U. S. 265.*

The effect of the writ of *certiorari* will be to complete the record on appeal to the extent that this Court will be able to ascertain therefrom, what requested findings were held to be immaterial by the Court of Claims. This is essential to this appeal. *United States* v. *New York Indians, 173 U. S. 464.*

Certiorari for diminution of the record is appropriate to the purpose indicated.

Morgan v. *Curtenius, 19 How. 8;*
United States v. *Gomez, 1 Wall. 690;*
United States v. *Adams, 9 Wall. 661;*
United States v. *Young, 94 U. S. 258;*
Missouri, Kansas & Texas v. *Dinsmore, 108 U. S. 30;*
American Construction Company v. *Jacksonville, Tampa & Key West Railway, 148 U. S. 372.*

As to the Motion to Remand for Additional Findings of Fact.

It is not appropriate that appeals from the Court of Claims should come in fragments and piecemeal to this Court. Appellant is entitled to such expedition towards the final determination of her suit as may be gained by the settlement of all controverted questions of law in a single appeal and *a fortiori* this Court is entitled to have its time protected against the burden of unnecessary and successive appeals in the same cause. Quite obviously, however, the present record does not contain findings of facts which may be deemed essential to a determination upon the merits.

The Court of Claims has decided that appellant was not entitled to recover an account of strictly technical objections. These objections were none of them raised, however, by the defendants in that Court (*R. 35*) and it is not unlikely that they will not see fit to press these objections in this Court. At any rate, appellant will contend that they are untenable. Appellant will, also, contend that her interest was not lawfully taxed at all but she will further contend that, if it was taxable at all it was taxable only in respect of its actual or clear value, that such value was much less than the amount in

respect of which collection was made and that, therefore, the amount collected was largely in excess of that which appellees are entitled to retain. But the Court of Claims refused all requests to find the true taxable value or facts which would establish such real value. Uncontradicted testimony supporting such findings was disregarded and thus the trial court ruled, as matter of law, that such facts are immaterial. The questions which this Court is now requested to remand for determination upon the evidence all relate to this actual or clear value.

A motion to remand for additional findings is proper in such a case and many cases have been remanded to the Court of Claims for such purposes.

Monroe v. *United States, 37 Ct. Cls. 79;*
United States v. *Adams, 9 Wall. 661;*
Mahan v. *United States, 14 Wall. 109;*
Raymond v. *United States, 92 U. S. 651;*
Ceballos & Company v. *United States, 214 U. S. 47;*
United States v. *Archer, 241 U. S. 119.*

Conclusion.

The writ of *certiorari* should issue and the cause should be remanded for additional findings as to the matters included in the motion.

All of which is respectfully submitted.

H. T. NEWCOMB
Attorney for Appellant

FREDERICK L. FISHBACK
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1917.

JENNIE LATHROP RAND, APPELLANT,
v.
THE UNITED STATES.
No. 544.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLANT'S MOTIONS FOR WRIT OF CERTIORARI AND REMAND TO COURT OF CLAIMS FOR ADDITIONAL FINDINGS OF FACT.

THE PURPOSE OF THE MOTIONS AND APPELLEES' OBJECTIONS.

The appellant moves for a writ of certiorari requiring the Court of Claims to certify as part of the record here:

1. Appellant's requested findings of fact filed May 10, 1916, numbered VII, XIV, XVI, and XVII, and that part of requested finding numbered IX which reads, "expectancies of life vary with race, age, sex, occupation, place of residence, and habits" (pp. 2, 15, 21, 22, 28).

2. Appellant's requested amendments to the court's findings of fact, filed February 6, 1917, numbered XII, XIII, XIV, and XVI (pp. 2, 26, 27, 29).

The appellees submit that the motions should be disallowed for the reasons:

1. That the Court of Claims is required to certify as part of the record here only its ultimate findings of fact, and not the proposed findings of the parties to the suit.

2. That every fact material to the final disposition of this case has been heretofore acted upon by the Court of Claims, and their action thereon is fully disclosed by the record as it now stands. (Court's Findings V, VI, VII, VIII.)

The appellant in the alternative moves to remand the case to the Court of Claims for the additional findings of fact described in her motion for writ of certiorari.

The appellees object to an order of remand upon the ground that the additional facts requested to be found are entirely immaterial.

STATEMENT.

This suit was brought in the Court of Claims to recover the difference between the tax assessed and collected by the United States, $3,026.69, under the act of June 13, 1898, 30 Stat. 448, 464, 465, upon a life interest in a trust fund created by the last will and testament of Edmund Dwight, deceased, by the Treasury Combined Experience Tables, and the amount that would have been assessed and collected if the facts concerning the particular fund and its earning capacity had been considered by the Treasury officials.

The petition was dismissed by the Court of Claims upon the grounds that the claim was barred by the statute of limitations, and further that the payment of the tax having been voluntary there was no liability upon the Government to refund it.

ARGUMENT.

The appellant contends that the assessment of the tax upon her life interest was confiscatory, the taking of property without due process of law, and therefore unconstitutional; that the present worth, or clear value, of her life interest was obtained by a general rule which worked hardship in some cases, her own among the number; that the tax should have been assessed in each case according to its particular circumstances, which would have been in effect an *ad valorem* tax on property in possession of the legatee—a tax not provided for by the act of June 13, 1898. The death duty is a succession tax imposed upon the right to receive the legacy and is deducted before the legacy becomes the property of the legatee, and is in the nature of an excise tax imposed for the privilege of doing a particular business.

Mortuary tables have been in use from the time of the Romans down to the present day. The experience tables adopted by the Treasury Department are the fairest of those in general use, as was found by the Court of Claims (Finding VII).

The question raised by the appellant in the instant case was also raised in *Knowlton* v. *Moore*, 178 U. S. 41, where the claim was made that the tax imposed by the act of 1898 was not uniform, in that

it bore more heavily on some estates than on others, and was therefore confiscatory and unconstitutional. The court after examining the return of the collector (p. 44) said, "The executors protested against the entire tax, and also as to the method by which it was assessed." The court in disposing of the case said that the provision of the Constitution that taxes should be uniform meant uniform geographically, that they should extend to all parts of the United States, and not that they should bear evenly upon all property taxed.

The court in *Vanderbilt* v. *Eidman*, 196 U. S. 480, 497, said:

> The practice followed in carrying out the statute was illustrated by the assessment which was made in the case considered in *Knowlton* v. *Moore*, 178 U. S. 41, as exhibited in the schedule on page 44 of the report of that case. It was also by this construction that the tax in this case was originally assessed only upon the beneficial interest which was being enjoyed by Alfred G. Vanderbilt.

The court in a case on all fours with this, *United States* v. *Fidelity Trust Company*, 222 U. S. 158, said in its opinion that an inheritance tax was assessed upon the life interest "with the aid of mortuary tables, the rate of interest being assumed to be 4 per cent, the clear value of the legacies to the niece was fixed."

The consideration of the Treasury tables has been before the court in numerous cases since the decision of *Knowlton* v. *Moore*, *supra*, and this is the first time

that the propriety of their use has ever been questioned.

For the reasons given it seems to us that the findings requested are clearly immaterial and the motions should be disallowed.

JOHN W. DAVIS,
Solicitor General.
HUSTON THOMPSON,
Assistant Attorney General.

APRIL, 1918.

○

19

Office Supreme Court, U. S.
FILED
FEB 8 1919
JAMES D. MAHER,

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 213

JENNIE LATHROP RAND, *Appellant.*

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

H. T. NEWCOMB,
Attorney.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y

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Supreme Court of the United States

OCTOBER TERM, 1918.

No. 213.

JENNIE LATHROP RAND, Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR APPELLANT.

Status.

This is a suit, under the Act of July 27, 1912 (*37 Stat. 240*), to enforce against the United States claim for the sum of $3,026.69, exacted from the appellant, who was the petitioner in the Court of Claims, during September, 1900, under color of the legacy tax provisions, repealed on July 1, 1902, of the Act of June 13, 1898 (*30 Stat. 448, 464-5*).

The case is here on appeal from the Court of Claims.

There are also, for consideration at this time, appellant's motions in this Court for *certiorari* for diminution of record, under Rule 14, and to remand for additional findings of fact. By order heretofore entered, the consideration of these motions was postponed until the argument on the merits.

Statutes.

The relevant statutes and portions of statutes are printed herein, at pages 75 *et seq.*, as an appendix hereto.

Summary of Facts Pertinent to the Merits.

Edmund Dwight, a citizen of the United States and of the Commonwealth of Massachusetts, a resident of Boston, died on June 6, 1900, leaving a valid last will, which was duly probated (*R. 24*).

Among the legacies provided in this will was one of $125,000.00 to the New England Trust Company, as trustee, "to be invested in the general trust fund of the company," and held as a trust fund until the "death of the last survivor" of Jennie Lathrop Rand, the appellant, and her three children, Margaret Arnold, Henry Lathrop and Edward Lathrop. On the determination of the trust the principal of the fund was to pass absolutely to Harvard College (*R. 24-5*).

Jennie Lathrop Rand, the appellant, was given the income of this trust fund for her life (*R. 24*).

Appellant was sixty-three years of age when Edmund Dwight died (*R. 26*).

The trust fund was established on October 1, 1900, by the payment of $125,000.00 to the trustee but under an agreement by which the income of appellant therefrom did not begin until December 1, 1900 (*R. 25*).

On January 1, 1901, appellant received the first installment of income under this trust, being paid the sum of $390.63 (*R. 25*). It will be noted that this is interest for one month (December 1, to December 31, 1900) on $125,-

000.00 at an annual rate of *three and three-quarters* per cent ($125,000.00 multiplied by .0375 produces $4,687.50 which, divided by 12 gives $390.63).

On July 1, 1901, and at six-months intervals thereafter, to July 1, 1904, inclusive, appellant received $2,343.75 being at the annual rate of *three and three-quarters* per cent (*R. 25*).

On January 2, 1905, and at six months intervals thereafter, to January 1, 1910, inclusive, appellant received $2,187.50, being at the annual rate of *three and one-half* per cent (*R. 25*).

On July 1, 1910, January 2, 1911, and July 1, 1911, appellant received $2,343.75 being at the annual rate of *three and three-quarters* per cent (*R. 25*).

On January 1, 1912, and at six-months intervals thereafter, to January 1, 1914, inclusive, appellant received $2,500.00 being at the annual rate of *four* per cent (*R. 25*).

On July 1, 1914, appellant received $2,497.50 (*R. 25*).

On January 1, 1915, appellant received $2,187.50, being at the annual rate of *three and one-half* per cent (*R. 25*).

No other payments out of, or on account of, this trust were made to appellant, or for her benefit, nor was she entitled to any other or additional payment during the period covered by the Record (*R. 26*).

The whole amount paid to appellant by the trustee prior to July 1, 1902, was $5,078.13 and the whole amount accruing to her use and benefit prior to that date was $7,421.88 (*R. 25.*)

Letters testamentary issued to Elizabeth Cabot, as executrix of the last will of Edmund Dwight and until her death on January 30, 1902, she was the duly appointed, qualified and acting executrix. Subsequent to January 30, 1902, Philip Cabot was the duly appointed, qualified and acting administrator, with the will annexed, of the estate of said decedent (*R. 24*).

On September 28, 1900, the executrix paid to the Collec-

tor of Internal Revenue, without protest and on account of the interest of appellant in said trust fund, the sum of $3,026.69 claimed in this suit and the whole of said sum was, thereafter and in the usual course of business, turned over to, and is still retained by, the United States (*R. 26, 28*).

The aforesaid sum of $3,026.69 was advanced by the executrix, but not at the cost of the trust fund of $125,000.00, under an agreement with appellant (*R. 27*) and was repaid to the executrix by appellant (*R. 28*).

The only "assessment" of the aforesaid sum of $3,026.69 or of any sum, in respect of the said interest of appellant, under Sections 29 and 31 of the Act of June 13, 1898, and amendments, which was ever made was made without specific investigation as to appellant's expectancy of life or the earning capacity of said trust fund or the value of the appellant's interest therein, and in pursuance of and in accordance with an arbitrary and general rule prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury (*R. 34*).

All taxes on legacies entitling the legatees to future payments were "assessed" by means of this arbitrary and general rule (*R. 28*).

The aforesaid arbitrary and general rule was promulgated on December 16, 1898 (*R. 28*), and was in words and figures as follows (*R. 28–33*).

> "(Series 7, No. 3—Revised, Supplement No. 1. United States Internal Revenue).
>
> "*Tables Showing the Present Worth of an Annuity, Life Interest, and of a Reversionary Interest, with Instructions for the Use Thereof in the Computation of Tax on Legacies and Distributive Shares.*
>
> "(December 16, 1898. Washington Government Printing Office. 1898).
>
> "(Series 7, No. 3—Revised, Supplement No. 1. United States Internal Revenue.)

"Instructions Concerning the Tax on Legacies and Distributive Shares.

"TREASURY DEPARTMENT,
"Office of the Commissioner of Internal Revenue.
"WASHINGTON, D. C.,
"December 16, 1898.

"The following tables, showing the present worth of an annuity, life interest, and of a reversionary interest, with explanatory notes and examples, are hereby published and promulgated for the use of internal-revenue officers and administrators, executors, or trustees in determining the duty or tax to be paid to the United States upon legacies or distributive shares arising from personal property, imposed by the act of June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes.'

"N. B. SCOTT,
"*Commissioner.*

"Approved:
"O. L. SPAULDING,
"*Acting Secretary of the Treasury.*"

"LEGACY TAXES—*Table, single life, 4 per cent, showing the present worth of an annuity or life interest, and of a reversionary interest, with explanatory notes and examples.*

"(*United States internal-revenue adjustment, 1898.*)

Age.	Mean redemption period.	Annuity or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
10	38.891	$19.45359	$0.21332
11	38.507	19.36943	.21656
12	38.113	19.28184	.21993
13	37.710	19.19065	.22344
14	37.298	19.09590	.22708
15	36.877	18.99764	.23086
16	36.447	18.89569	.23478
17	36.010	18.79010	.23884
18	35.565	18.68070	.24305
19	35.113	18.56751	.24740
20	34.652	18.45038	.25191
21	34.186	18.32932	.25656
22	33.711	18.20416	.26138
23	33.230	18.07471	.26636
24	32.742	17.94097	.27150
25	32.248	17.80274	.27682
26	31.747	17.65984	.28231
27	31.239	17.51224	.28799
28	30.725	17.35968	.29386
29	30.205	17.20225	.29991
30	29.678	17.03961	.30617
31	29.147	16.87176	.31262
32	28.608	16.69846	.31929
33	28.067	16.51964	.32617
34	27.516	16.33503	.33327
35	26.961	16.14437	.34060
36	26.401	15.94755	.34817
37	25.834	15.74427	.35599
38	25.263	15.53421	.36407
39	24.685	15.31722	.37241
40	24.101	15.09295	.38104
41	23.511	14.86102	.38996
42	22.915	14.62122	.39918
43	22.313	14.37456	.40871
44	21.708	14.11860	.41852

"LEGACY TAXES—*Table, single life, 4 per cent, showing the present worth of an annuity or life interest, and of a reversionary interest, with explanatory notes and examples.*

"(*United States internal-revenue adjustment, 1898.*)

"(*continued*)

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
45	21 103	$13.85713	$0.42857
46	20.499	13.58958	.43886
47	19.896	13 21698	.44935
48	19.298	13.03942	.46002
49	18.703	12.75716	.47088
50	18.113	12.47032	.48191
51	17.527	12.17919	.49311
52	16.947	11.88408	.50446
53	16.372	11.58531	.51595
54	15.804	11.28325	.52757
55	15.243	10.99789	.53931
56	14.689	10.66982	.55116
57	14.143	10.35931	.56310
58	13.603	10.04630	.57514
59	13.072	9.73131	.58726
60	12.549	9.41474	.59943
61	12.029	9.09765	.61163
62	11.532	8.78052	.62382
63	11.039	8.46412	.63600
64	10.557	8.14888	.64812
65	10.088	7.83552	.66017
66	9.630	7.52476	.67212
67	9.185	7.21699	.68396
68	8.753	6.91298	.69565
69	8 333	6.61301	.70719
70	7.926	6.31716	.71857
71	7.532	6.02612	.72976
72	7.151	5.74003	.74077
73	6.782	5.45928	.75157
74	6.425	5.18402	.76215
75	6.081	4.91463	.77251
76	5.749	4.65125	.78264
77	5.428	4.39383	.79254
78	5.119	4.14286	.80220

"LEGACY TAXES—*Table, single life, 4 per cent, showing the present worth of an annuity or life interest, and of a reversionary interest, with explanatory notes and examples.*

"(*United States internal-revenue adjustment, 1898.*)

"(*continued*)

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
79	4.823	$3.89858	$0.81159
80	4.537	3.66071	.82074
81	4.262	3.42900	.82965
82	3.995	3.20258	.83836
83	3.737	2.98024	.84691
84	3.484	2.76106	.85534
85	3.236	2.54366	.86371
86	2.992	2.32795	.87200
87	2.752	2.11384	.88024
88	2.517	1.90115	.88842
89	2.286	1.69107	.89650
90	2.062	1.48540	.90441
91	1.845	1.28432	.91214
92	1.637	1.08024	.91961
93	1.442	.90647	.92667
94	1.263	.73687	.93320
95	1.103	.58435	.93906
96	.975	.46182	.94378
97	.877	.36698	.94742
98	.746	.24038	.95229
99	.500	.00000	.96154

"*Example 1.* A person dying bequeaths to his nephew, aged 40 years, an annuity of one thousand dollars during life. What is the present value of the annuity?

"Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged 40 years, is fifteen dollars nine cents two mills and ninety-five one-hundredths of a mill ($15.09295); therefore the present value of one thousand dollars is one thousand times as much, or fifteen thousand

and ninety-two dollars and ninety-five cents, the amount upon which tax accrues.

"*Example 2.*—A person dying bequeaths to his daughter, aged 35 years, a life interest in personal property amounting to fifty thousand dollars ($50,000), the estate to revert absolutely at her death to other parties. Required the present value, at the date of death of the testator, of the life interest of the daughter in the estate; also, required at the same date, the present value of the reversionary interest of said other parties in the estate.

"At a net interest of 4 per cent per annum, the assumed rate, the estate of $50,000 will realize an income or annuity of $2,000 per annum. The present value of the sum of $1, payable at the end of each year during the life of a person aged 35 years, is found by the table to be $16.14437, and the present value of an annuity of $2,000 for the same time would be two thousand times as much, or $32,288.74, the amount upon which tax accrues.

"The reversion or present value of $1, due at the end of the year of death of a person aged 35 years, is found by the table to be $0.34060, and such value of $50,000 would be fifty thousand times as much, or $17,030, the amount upon which tax accrues.

"NOTE.—This table is based on the 'Actuaries' or 'Combined Experience Table,' money being worth 4 per cent per annum.

"The first column shows the age of the person under consideration.

"The second column shows the corresponding 'mean redemption period,' and represents the time in years in which the present values of annuities and reversions certain will become equal respectively to the present value of annuities and reversions contingent on the duration of life.

"The 'mean redemption period' is a mean between the last payment of the annuity and the payment of the reversion, averaging six months later than the former payment and six months earlier than the latter payment.

"The third column shows the present value of an annuity for life of one dollar per annum, the last

payment being made at the end of the year prior to the one in which death occurs.

"The fourth column shows the present worth of one dollar payable at the end of the year in which death occurs.

"NOTE.—This adjustment has been prepared under the direction of Mr. J. S. McCoy, Government actuary.

"*Present value of annuities and reversions certain upon a 4 per cent basis.*

Number of years.	Present worth of an annuity of one dollar payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.
	Annuity.	*Reversion.*
1	$0.96154	$0.961538
2	1.88609	.924556
3	2.77509	.888996
4	3.62989	.854804
5	4.45182	.821927
6	5.24214	.790314
7	6.00205	.759918
8	6.73274	.730690
9	7.43533	.702587
10	8.11089	.675564
11	8.76047	.649581
12	9.38507	.624597
13	9.98565	.600574
14	10.56312	.577475
15	11.11839	.555265
16	11.65229	.533908
17	12.16567	.513373
18	12.65929	.493628
19	13.13394	.474642
20	13.59032	.456387
21	14.02916	.438834
22	14.45111	.421955
23	14.85684	.405726
24	15.24696	.390121
25	15.62208	.375117
26	15.98277	.360689
27	16.32958	.346816
28	16.66306	.333477
29	16.98371	.320651
30	17.29203	.308319

"*Example.*—A man dies leaving personal property to the amount of $50,000, his daughter to have the income from it for twenty years, it then to revert to his youngest son. What is the present worth of these legacies?

"The income from $50,000 would be $2,000 per annum, assuming money at 4 per cent.

"The present worth of an annuity of $2,000 for twenty years will be 2,000 times an annuity of $1 for twenty years. In the table, opposite 20, we find the value of an annuity of $1 to be $13.59032; therefore the present worth of an annuity of $2,000 will be $27,180.64.

"A reversion of $1 at the end of twenty years is shown by the table to be $0.456387, and a reversion of $50,000 will be 50,000 times as much, or $22,819.35."

The "assessment," of appellant's interest, in accordance with the foregoing arbitrary and general rule, resulted in the determination that its "present worth," at the date of her testator's death, was $42,320.60 (*R. 34*), which was computed, by the application of said rule, in the following manner.

For the purposes of the computation it was assumed (1) that appellant's income began at the date of the death of her testator (*R. 34*), (2) that the trust fund would produce for her benefit at the rate of four per cent per year or $5,000.00 per year (*R. 33*), (3) that the then clear value of each income payment she would receive was the sum which if placed at interest at four per cent on the date of her testator's death would produce the amount of such income payment on the date on which it would be received (*R. 30, 32*), and (4) that appellant's expectancy of life was identical with the average expectancy of persons sixty-three years of age shown in the tables selected for the purposes of the general rule (*R. 28-33*). These assumptions supported the following calculation:

$8.46412 ("Annuity, or present value of one dollar due at the end of each year during the life of a person" sixty-three years of age—*R. 30*) multiplied

by 5000 ($125,000.00 at four per cent per year produces $5,000.00 annually—*R. 33*) produces $42,320.60 (*R. 34*).

From $42,320.60, computed as above, the Commissioner of Internal Revenue deducted $1,964.69 (the inheritance tax paid to the Commonwealth of Massachusetts), leaving $40,355.91. From this calculation he concluded that $40,355.91 was the taxable "clear value" of appellant's interest. To this sum of $40,355.91 the tax rate of $7.50 per $100.00 was applied and thus was determined the sum of $3,026.69 herein sought to be recovered (*R. 34*).

New England Trust Company, on December 24, 1913, by its attorney appealed to the Commissioner of Internal Revenue to refund said $3,026.69, contending that such refund was authorized by the Act of Congress of July 27, 1912, *37 Stat. 240* (*R. 34-5*). This claim was rejected on March 28, 1914 (*R. 35, 45*), and the Acting Commissioner of Internal Revenue stated to said attorney, as reason for such rejection:—

> "this tax was paid upon the absolutely vested interest of a stranger amounting to more than $25,000.00 and taxed at the legal rate of $7.50 per $100.00, and accordingly, under the decision of the Supreme Court in the Knowlton and Fidelity Trust cases, all this tax was legally due."—*R. 45-6*.

On December 30, 1913, the aforesaid administrator with the will annexed, by his attorneys, appealed to the Commissioner of Internal Revenue to refund said $3,026.69 (*R. 45*). This claim was rejected on March 28, 1914 (*R. 45*), and the Acting Commissioner of Internal Revenue stated to said attorneys, as reason for such rejection—

> "this tax was paid upon the absolutely vested interest of a stranger amounting to more than $25,000.00 and taxed at the legal rate of $7.50 per $100.00, and accordingly, under the decision of the Supreme Court in the Knowlton and Fidelity Trust cases, all this tax was legally due."—*R. 45-6*.

No appeal to the Commissioner of Internal Revenue, other than as stated in the next two foregoing paragraphs, was ever made (*R. 35*).

All the above statements of fact are supported by the findings of fact of the Court of Claims (*R. 24-35, 45-6*).

Summary of Facts Pertinent to Motions.

Appellant considered facts to have been proven and to be relevant and material to a proper presentation of her case in the findings of fact, which were duly covered by requests for findings submitted to the Court of Claims before trial (*Motion for Certiorari, etc., 5-23*), but were not included in the original findings of fact by the Court of Claims (*R. 24-35*), or in the additional finding subsequently made by the Court of Claims (*R. 45-6*) and duly moved the Court of Claims to include in the record on appeal these certain requested findings of fact which said motion was denied (*R. 47*).

Thereupon appellant, by her attorney, moved in this Court, under Rule 14, for *certiorari* for diminution of record and, also, to remand for additional findings. Consideration of both of these motions was postponed until this occasion.

These motions are supported by the following:—

1. A copy of appellant's original request for findings of fact duly filed in said Court of Claims before trial in accordance with Rule 5 of this Court, duly certified by the Chief Clerk of said Court of Claims (*Motions for Certiorari, etc., 5-23*).

2. A copy of appellant's motion for new trial duly filed in said Court of Claims, with requests for additional findings of fact, duly certified by the Chief Clerk of said Court of Claims (*Motions for Certiorari, etc., 23-8*).

3. A copy of appellant's motion in said Court of Claims to include in the record on appeal certain requested findings of fact, duly certified by the Chief Clerk of said Court of Claims (*Motions for Certiorari, etc., 28-9*).

4. Affidavit of appellant's attorney stating that he made diligent search of all testimony and reports before said Court of Claims in the proceedings in this case and believes that each and every of said requests for findings in said motion for new trial was fully supported by competent and uncontradicted testimony (*Motions for Certiorari, etc., 30-1*).

Among the additional findings of fact which were requested in appellant's said motion for new trial (*R. 45*) and referred to in said affidavit of appellant's attorney (*Motion for Certiorari, etc., 30-1*) are the following:

XII.

Interest rates are different at the same time and on the same kind and grades of security in different portions of the United States, and those obtained upon different kinds and grades of investments and from loans upon different kinds and grades of security are different in the same places at the same time, and there are also differences as between periods of time, other conditions being substantially identical. Around New York the rate of interest earned by trust funds is much lower than in the West. *Motions for Certiorari, etc., 26.*

XIII.

Actual expectancies of life vary with race, age, sex, occupation, place of residence, condition of health and habits. *Motions for Certiorari, etc., 27.*

XIV.

Four (4) per centum per annum was a lower rate of discount than it was reasonable to assume, at any time in the year 1909, could be obtained should the petitioner then undertake to dispose of or to anticipate her expected income from the trust fund. *Motions for Certiorari, etc., 27.*

XV.

The valuation of $40,355.61, assigned to the interest of the petitioner, by the Commissioner of Internal Revenue, in pursuance of the general rule of

assessment set forth in finding V, was too high and was greater than the clear value or actual value of the interest of the petitioner. *Motions for Certiorari, etc., 27.*

XVI.

Interests such as that bequeathed to the petitioner are salable, when such sales are not prohibited by law or by the terms of particular wills, and there are persons who make a business of buying them. To reduce such transactions to a business basis it is necessary to make allowances for many different elements of risk and to insure against as many of them as possible and to make extensive and costly inquiries as to the facts and the law. There is no general market for such interests and those who purchase commonly exact very high rates of interest on their money and commissions in addition to interest. A fair price, in such a purchase, for the interest of the petitioner, would have been $15,000. *Motions for Certiorari, etc., 27.*

Appellant's Propositions.

On the facts stated, appellant suggests that:—

I. That there was never any lawful assessment of any Federal tax in respect of appellant's interest in the trust fund bequeathed to New England Trust Company by Edmund Dwight.

II. That without a lawful assessment, prior to July 1, 1902 (the date of the repeal of the tax), no tax was imposed and no obligation to pay arose and, therefore, nothing could have been legally collected or can lawfully be retained.

III. That (if it can be held that any part of the sum collected should be retained), it is at least true that there has been no lawful determination of any tax due to the United States. Unless there can be such a determination on the present Record, the suit should be remanded to the Court of Claims for additional findings.

ARGUMENT.

The foregoing propositions will be discussed in the order in which they have been presented.

Merits Not Considered By Court of Claims.

But, first, it is necessary to present the considerations which moved the Court of Claims to dismiss the suit. All the foregoing propositions were presented to that Court by briefs and by oral argument, and no other questions were considered by counsel for either claimant or defendants, but none of them received consideration. The opinion below says:—

> ". . . it appears that there are preliminary and material questions for our consideration which have not received the attention of counsel on either side, and the determination of which may render it unnecessary for us to give any consideration to the questions discussed." *R. 35; 52 Ct. Cls. 73.*

Whereupon, the Court of Claims proceeded to the conclusion that, irrespective of the merits, the suit could not be maintained for two reasons, as follows:

1. Because the payment of $3,026.69 was made without protest (*R. 37-44; 52 Ct. Cls. 76-86*), and,
2. Because it was considered that the suit was not supported by the "appeal . . . to the Commissioner of Internal Revenue," required prior to suit in cases in which R. S. 3226 is applicable. (*R. 35-7, 46-7; 52 Ct. Cls. 74-6; 52 Ct. Cls. 287-8*).

> "The conclusions upon the two points discussed are either of them so decisive of this case that we regard it as unnecessary to discuss the question presented by counsel as to the validity of the assessment."—*R. 44-5; 52 Ct. Cls. 87.*

So the Court of Claims did not inquire whether there had been exacted from appellant $3,026.69 or any other sum, which could not lawfully have been exacted.

Appellant conceives that the Court of Claims was in error upon both points.

Absence of Protest no Bar to Recovery Under Act of July 27, 1912.

This suit is under the Act of July 27, 1912 (*R. 35; 52 Ct. Cls. 74*). Whether protest is essential to recovery under that Act appears to have been finally determined by this Court. In *United States* v. *Hvoslef, 237 U. S. 1,* defendants' counsel objected that there was no record of protest and should apparently have prevailed if protest were required. The words of the opinion are:—

> "It is also apparent, in the light of the manifest purpose and scope of the legislation to which we have referred, that the contention based upon the absence of protest cannot be sustained. Where taxes have been illegally assessed upon the 'contingent interests' described in the refunding act of 1902 it has been held that recovery may be had although the taxes were paid without protest. *United States* v. *Jones, supra.* In the acts of 1907 and 1909, *supra*, with respect to stamp taxes on 'export ships' manifest' and on foreign bills of exchange against exports, Congress expressly provided for refunding whether the taxes had been paid under protest or not. The fact that these express words were not repeated in the Act of 1912 cannot, in view of the nature of the subject, be regarded as evidencing a different intent; rather must this act receive in this respect the same construction as that which has been given to the act of 1902. If it appeared that the sums sought to be recovered were not legally payable, and the claim was duly presented within the time fixed, the right to repayment was established by the express terms of the statute." *237 U. S. 1, 12-13.*

It is so difficult to comprehend why the foregoing was not considered conclusive in respect of the question of protest, that but for the fact that it is quoted in the opinion of the Court of Claims (*R. 35, 41; 52 Ct. Cls. 72, 82*), it must have been supposed that it was overlooked by the learned judges of that Court. But the Court of Claims said:

> "Lest it be assumed that we have not given it consideration, it may be well to distinguish the case of *United States* v. *Hvoslef*, *237 U. S. 1*, in which it was held that there might be recovery without protest having been made." *R. 38; 52 Ct. Cls. 77.*

If it is correctly understood, the substance of the opinion of the Court of Claims is that whether protest is essential to recovery under the Act of July 27, 1912, is left, by the decision of this Court in *Hvoslef's case*, *supra*, to depend *upon the character of the tax* sought to be recovered or *the source of the illegality* found. The opinion, commencing with a part of the paragraph from the opinion of this Court, above quoted, says:—

> "'Rather,' it is then said, 'must this act receive the same construction as that which has been given to the Act of 1902.' Rather, that is to say, must this act, *in so far as it relates to the classes of taxes under discussion*, receive the construction put on the act of 1902 in the case cited as to that construction, the *Jones case*, and in fact the only case in which the construction is found, and that holding is to the effect that as to the particular taxes referred to in that act, refunder of which was directed, the question of protest was eliminated." *R. 42-3; 52 Ct. Cls. 84.*

Certain words in the foregoing are italicised in this brief, not in the original, in order to give emphasis to the distinction that is suggested. The inference seems justified that the Court of Claims has interpreted the Act of July 27, 1912, as speaking with one effect as to certain classes of exactions which are within its purview and to

the opposite effect as to other classes equally within its scope. In other words, it appears to have been held to mean one thing (that protest is unnecessary) in some cases, another thing (that recovery can be had only where there was protest) as to other cases. It is considered that statutes should be construed so as to apply uniformly to all subjects to which they apply at all.

Section 2 of the Act of July 27, 1912, follows the third section of the Act of June 27, 1902 (*32 Stat. 406*) very closely in both form and substance. Both direct the Secretary of the Treasury to do something with reference to sums collected under color of the legacy tax provisions of the Act of June 13, 1898. The earlier directs him "to refund," the later act directs him "to pay." The refund in the one case is to be measured by an amount collected under the taxing statute, the amount to be paid under the later law is to be measured in the same way. Both acts are intended, one must assume, to provide for the fulfillment, on the part of the United States, of its moral obligation to restore to persons from whom exactions had wrongfully and illegally been made, the sums wrongfully and illegally taken. Congress is empowered to appropriate to meet such obligations (*United States* v. *Realty Company, 163 U. S. 427*). In neither case were the persons to be benefited in a legal position to enforce repayment. If they had been, there would have been no occasion for either act. Moral obligations on the part of the United States, running to those from whom moneys had illegally been taken, were in existence and could be extinguished only by repayment; there were no legal obligations and no legal rights. Therefore, in both cases, Congress, in the exercise of its lawful authority, provided that there should be freely given to each person who had thus been damaged, an amount measured and fixed by the amount of which he had been wrongfully deprived. Both acts provided that certain payments should be made to persons within designated classes. The class designated by the Act of June 27, 1902, consists of those whose contingent beneficial in-

terests had not vested absolutely in possession or enjoyment prior to July 1, 1902; the class designated by the Act of July 27, 1912, consists of those from whom money had been collected under erroneous or illegal assessments. In either case, all that could be required to establish the right to repayment, was to show the facts bringing the claimant within the designated class. If, as in *United States* v. *Jones*, *236 U. S. 106*, and in the case at bar, the Secretary of the Treasury refused to make the payment, suit might be maintained in the Court of Claims. Such a suit is not, in a technical sense, *a suit to recover a tax*, but it is *a suit to enforce a payment provided for by a law of* the United States (*United States* v. *Hvoslef*, *237 U. S. 1*). The substantial similarities of the two statutes are disclosed below:—

Section 3 of Act of June 27, 1902.	*Section 2 of Act of July 27, 1912.*
The Secretary of the Treasury be and he is hereby authorized and directed to refund, out of any money in the Treasury, not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July 1, 1902.	That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States, not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid.

Section 3 of the Act of June 27, 1902, was before the Court of Claims in *Jones* v. *United States*, *49 Ct. Cls. 408*, and *Fidelity Trust Company* v. *United States*, *45 Ct. Cls. 362*. In neither case was there protest. In both cases the Court of Claims held for the claimants. The case first

cited was affirmed by this Court (*236 U. S. 106*), the second was reversed but not on account of lack of protest (*United States* v. *Fidelity Trust Company, 222 U. S. 158*). Delivering the opinion of this Court in *Jones' case*, Mr. Justice Van Devanter noted the absence of protest, saying:—

> "The Collector of Internal Revenue then collected from the administrator, *without protest from him*, a succession tax of $3,290.12 upon the distributive shares of the daughters, and the tax was covered into the Treasury," *236 U. S. 106, 109.*

It is respectfully submitted that the closest scrutiny of the Acts of June 27, 1902, and July 27, 1912, discloses no difference in letter or spirit sufficient to support a different conclusion as to the later Act. In *Hvoslef's case, supra*, this Court, as already noted, held that no different conclusion is warranted.

Moreover, the Act of July 27, 1912, requires claimants thereunder to establish merely "erroneous or illegal assessment and collection." If this requirement is satisfied, the Act directs that the amount indicated shall be repaid to the claimant. No other condition is to be found in the language of the law. To require proof of protest, is to add a further requirement which Congress did not enact. This, it would appear, is to write into the Act an additional requirement not within the language used or within any intention that can be ascribed to the lawmakers. Such was the view of Judge Noyes, who decided *Hvoslef's case, supra*, in the Circuit Court (*217 Fed. 680*).

> ". . . the Act of 1912, indicated an intention on the part of Congress to make restitution. It uses broad language. It imposed no condition as to protest. It said that 'all' claims for taxes illegally assessed might be presented, not merely claims where payments had been made under protest. Moreover, to make it the duty of the Secretary to pay, the claimants after presenting their claims, were required to establish only 'such erroneous

> or illegal assessment or collection.' The Act is, in my opinion, complete in itself and gives the claimants a right of action regardless of the requirements in case of a statute under other conditions (*See Campbell* v. *United States*, *107 U. S. 407*; *Thatcher* v. *United States*, *149 Fed. 902*)." *217 Fed. 680, 682.*

It is submitted that the instant proceeding is not a suit, as suggested in the opinion of the Court of Claims, in which—

> "refunder is sought under the general statute . . ."—*R. 43; 52 Ct. Cls. 85.*

or a case—

> "arising under the general statute, . . ." R. 44; *52 Ct. Cls. 86.*

The words of that Court in *Fidelity Trust Company* v. *United States*, *supra*, are directly applicable. The opinion says:

> "We do not think it can properly be said that this suit arises under the revenue laws at all. It arises under a statute for the refunding of taxes illegally collected under the revenue laws, and the procedure and rules governing it are no different than they would be if the money had reached the Treasury in any other manner." *45 C. Cls. 362, 367.*

Immediately preceding the foregoing the opinion quotes, with approval, an opinion of Attorney General Bonaparte as follows:

> "The provisions of the statute are special and apply to a particular class of applications against the Government. Being special, these claims are not governed by the provisions of the prior general statute (*R. S. 3,228*). Suits brought to recover money due under the Act are not actions for the recovery of taxes, but for money held by the Government in trust for the parties to whom it rightfully belongs." *26 Op. Atty. Genl., 195, 197.*

The Act of July 27, 1912, appears to have been formulated with especial recognition of the view thus laid down by the Attorney General, namely, that the moneys indicated are in the nature of trust-funds held by the Government. The report of the Committee on Judiciary of the House of Representatives (*Sixty-second Congress, second session, House Report No. 848*), submitted on June 6, 1912, recommending the passage of the Act, contains the following:

> " . . . no provision has as yet been made for the refund of taxes illegally collected where the rates were excessive or the tax was illegally exacted . . . these taxes are practically trust-funds in the United States Treasury belonging to the claimants, and a reasonable time ought to be given in which to present these claims, which your committee is of the opinion should be fixed as January 1, 1914."

Reports of committees are competent evidence of legislative intent (*The Delaware, 161 U. S. 459, 472; Butfield* v. *Stranahan, 192 U. S. 470, 495*).

There is no suggestion anywhere in the record that this suit is brought under any statute other than the statute of July 27, 1912, *supra*. The only right which appellant had or could have had is the right to enforce the gift pro vided for her benefit by the Act of July 27, 1912. The claim printed in the record (*R. 34-5*) recites that it was made under the Act of July 27, 1912, and the petition sets up (*R. 14*) as the ground for relief—

> " That the Act of July 27, 1912, contained an appropriation out of the Treasury of the United States for the funds necessary to repay to the petitioner the said sum of $3,026.69, so illegally assessed, collected and held by the United States, or any part thereof that may be held to have been erroneously or illegally assessed or collected, and authorized and directed the Secretary of the Treasury to make such repayment."

Appellant expressly contends that she is within the class designated by the Act of July 27, 1912, and that a sum should be paid to her, which sum should be fixed and determined so as to be equivalent to the amount illegally taken from her under color of the Act of June 13, 1898, and amendments. This contention, it is considered, brings her claim within the precise terms of the decision of this Court in *United States* v. *Hvoslef* (237 U. S. 1). It is not thought that to so hold would deny the authority of any decision holding that *taxes* voluntarily paid cannot, as such, be recovered by suit. *The essential distinction is that this suit is brought under a special act which designates a class and directs specific payments to be made to the members of that class, when their identity has lawfully been established.*

See, also, as to the absence of necessity for protest in such cases:

Thatcher v. *United States*, 149 Fed. 902, 903.
Daly's case, 26 Op. Atty. Gen. 195, 197-8.

Sufficient Claim Made Before Suit.

Section 2 of the Act of July 27, 1912, *supra*, under which this suit was brought provides that payment shall be made—

> "to such claimants as have presented or shall hereafter *so present their claims*, . . ."

The words "so present their claims," in the foregoing refer to Section 1, of the same Act which, so far as material at this point, reads:—

> "That all claims for the refunding of any internal tax . . . under the provisions of Section 29 of the Act of Congress approved June 13, 1898, . . . may be presented to the Commissioner of Internal Revenue on or before the first day of January, 1914, and not thereafter."

R. S. 3226 is as follows:

> "No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section."

The Court of Claims concluded that this suit had not been preceded by a claim satisfying the requirements of *R. S. 3226* and that therefore it could not be maintained, saying:

> "However, Section 3226, R. S., as amended, is unaffected by the Act of July 27, 1912, . . ." *52 Ct. Cls. 72, 74.*

The foregoing is, perhaps, mistaken, as R. S. 3226 is a part of the Internal Revenue system, and it would seem, from *United States* v. *Hvoslef, supra*, and the cases therein cited, that suits for the enforcement of Section 2 of the Act of July 27, 1912, have nothing to do with that system. If so, the only statute of limitation affecting this suit is R. S. 1069 which requires suit to be brought within six years from the date on which the cause of action accrues—*Rice* v. *United States, 122 U. S. 611, 617.* However that may be, the second section of the Act of 1912 does refer to the presentation of claims and whether it is the provision of the Revised Statutes or that of the refunding section which must be satisfied is not very significant.

It is submitted that both have been met in the instant case. Two claims for the refund herein sought were filed prior to January 1, 1914, and both were considered upon their merits by the Commissioner and rejected because he held that the money had been lawfully collected. (*R. 34-5, 45-6*).

The record on appeal shows that a claim for the precise amount sued for in this proceeding was filed by the duly authorized attorney of the New England Trust Company (*R. 34-5, 36; 52 Ct. Cls. 74-5*), the trustee of the fund in respect of the income of which the "tax" was collected; was considered upon its merits by the Treasury Department (*R. 35, 45-6*), and was rejected on March 28, 1914, for no other reason than that it was held by the adjudicating officers that the decisions of this Court in *Knowlton* v. *Moore* (*178 U. S. 41*) and *United States* v. *Fidelity Trust Company* (*222 U. S. 158*) sustained the legality of the collection (*R. 45-6; 52 Ct. Cls. 286*). Another claim, believed, also, to be sufficient to support this suit, was filed by the administrator with the will annexed of her testator's estate, the successor to the person required to pay the "tax," considered upon its merits and rejected for identical reasons (*R. 45-6; 52 Ct. Cls. 286*).

The Court of Claims does not seem, before considering the instant case, to have conceived that the "appeal" required by R. S. 3226 and similar statutes must conform to the last rigor of merely technical standards. It would appear to have considered that whenever the facts had been laid before the Departmental officers, with a demand for repayment, and this demand determined upon the merits, such statutes had been satisfied. In *First National Bank of Greencastle* v. *United States* (*45 C. Cls. 225*), which involved the recovery of an internal revenue tax, the Government objected that claim had not been made within the statutory period and the Court of Claims, citing *Woolner's Case*, *13 C. Cls. 355*, said:

> "We hold, however, that the Commissioner's decision on that point upon evidence before him, in the absence of fraud or irregularity, was conclusive, and cannot be set aside in this court."

In *Wayne* v. *United States*, *26 C. Cls. 274*, no "appeal" for refund on the part of any one claiming authority to represent the taxpayer was ever filed. It was urged as a matter of defense, that --

> "the original allowance or award by the Commissioner of Internal Revenue was void, because the claim was not presented to him in a formal manner on a blank prescribed by the Secretary of the Treasury, within the time limited by the Act (*R. S. 3228*)." *26 C. Cls. 274, 289.*

The facts in regard to the claim, as stated by the reporter of the Court of Claims, were as follows:

> "James M. Wayne was an associate justice of the Supreme Court of the United States from September 1, 1862, to June 30, 1867. Pursuant to the Acts of July 1, 1862, Section 86 (*12 Stat. 472*); Act of June 30, 1864, Section 123 (*13 Stat. 285*), and the amendments of July 4, 1864 (*13 Stat. 417*), and 14 Stat. 139, 480, there was deducted from the salary of said justice the sum of $1,128.97 income tax from September 1, 1862 to June 30, 1867. On the thirtieth day of April, 1872, a statement was made out in the Comptroller's office showing the amount so withheld from Mr. Justice Wayne's salary and was attached to a blank form of application for refund of taxes improperly paid. . . . It does not appear that any formal written application for refund of said tax was ever filed in the office of the Commissioner of Internal Revenue by Mr. Justice Wayne." *26 Ct. Cls. 274, 276.*

Concerning the validity of the claim thus described, the Court of Claims said:

> "In the opinion of the Court this was a sufficient presentation of the claim within the meaning of the statute and the regulations, accepted as it was by the Commissioner." *26 C. Cls. 274, 290.*
>
> See, also, *14 Opinions Attorney General, 615.*

The acceptance and action upon the claims in the case at bar, such action being a rejection upon the merits and

therefore according sanction to the claims, as actual *claims* under R. S. 3220 and valid "*appeals*" under R. S. 3226, by the Commissioner and the Secretary of the Treasury (*R. 45-6*), is considered to be, in the absence of any suggestion of bad faith, conclusive as to their sufficiency under the statute.

Moreover, even if the sufficiency of a claim adjudicated upon the merits by the proper officers of the Treasury Department could be questioned, it is believed that either the claim disclosed by finding IX (*R. 34-5*) or additional finding X (*R. 45*) would be, standing alone, sufficient under the statute. The law provides that claims of the character specified "may be presented to the Commissioner;" but makes no restriction as to those by whom they may be presented and, although the inference is that they should be presented by parties having some legal or beneficial interest, or standing in some legal or fiduciary relation to their legal or beneficial owners, there is nothing which suggests merely technical requirements. In this case, the claim disclosed by finding IX (*R. 34-5*) was presented by the testamentary trustee, then holding trust funds to the use of the claimant and authorized and required to protect all her interests under and in connection with the trust fund. The other claim was filed by the personal representative of the decedent, successor to the executrix who had actually made the payment (*R. 26, 45 6*), although such payment was at the cost of this appellant (*R 28*). The officers of the Government were not misled at any time; there was no question as to the identity of the payment sought to be recovered or that of the person to whose benefit recovery would accrue. The Commissioner of Internal Revenue was fully advised that the application of the trustee was for moneys paid with respect to claimant's legacy, as appears from the letters of rejection (*R. 45-6*).

The Act of July 27, 1912, is upon its face an highly remedial statute. It is not necessary to go beyond the letter of the Act to establish the fact that Congress be-

lieved that moneys which had been erroneously and illegally assessed and collected under color of the legacy tax provisions contained in Section 29 of the Act of June 13, 1898, and amendments, were held in the Treasury of the United States and that the persons from whom those sums were wrongfully withheld were no longer in the legal situation necessary to demand their repayment. Under these conditions, and as an act of grace, Congress provided that the sums thus withheld should be repaid in all cases in which claim therefor was made within the period specified. Such statutes are always construed with liberality. It is especially incumbent upon all courts, tribunals, and officers administering such statutes, to apply this rule when, as in the case at bar, injustice and injury would otherwise result and it is impossible that injury or injustice should result to either party from its application.

> " Statutes which . . . give compensation to those whose property is taken compulsorily, (and) statutes which are in favor of those on whom taxes are assessed or burdens laid . . . are remedial and to be liberally construed." *Lewis' Sutherland, Statutory Construction, second edition, section 680.*
>
> See, also, *Neurath* v. *District of Columbia, 17 C. Cls. 225.*

There are many cases which go much farther than the position of appellant would require in allowing latitude in the matter of claims required to precede suit. In *Newcomber* v. *United States, 51 Ct. Cls. 408*, the claimant sued to enforce a claim under the Act of Congress of March 3, 1885 (*23 Stat. 350*), which provided compensation for loss of property by officers and men in the military service, under certain circumstances. The defense objected that the claims necessary to support the jurisdiction of the Court of Claims had not been filed. The Act in question provided that:—

> " all claims now existing shall be presented within two years and not after from the passage of this

Act; and all such claims hereafter arising be presented within two years from the occurrence of the loss or destruction." *51 Ct. Cls., 408, 413; 23 Stat. 350.*

The Court said:

> "The Act not only requires presentation to the accounting officers *or a legal excuse for not presenting it*, but in terms provides that the claim 'be presented within two years from the occurrence of the loss or destruction.' This provision is not a mere limitation of time but inheres in the cause of action itself. Unless so presented, *or presentation be excused*, there is no right of action, because it was perfectly competent for Congress to declare that only those claims which were so presented within two years could be paid." *51 Ct. Cls. 408, 421.*

The question was, therefore, whether claim had been made or the making of a claim was excused. The Act of March 3, 1885, under which payment was claimed, in terms provided that it should not apply "to losses sustained in time of war" (*51 Ct. Cls. 408, 424*). The loss was sustained on May 16, 1899. *This date is material.* The facts relied upon to amount to making claim were, as stated in the opinion, these—

> "On April 22, 1901, the Quartermaster General transmitted to the Secretary of War a number of claims of officers for losses occasioned by the sinking of said transport, among the claims so transmitted being that of Captain Foster. . . . Said communication was, on May 7, 1901, returned by the Secretary of War to the Quartermaster General 'to file in view of statements contained in letter of Auditor for the War Department, dated May 2, 1901, and decisions of the Comptroller therein referred to.' No further action was taken upon said claim until suit was brought in this court on April 5, 1905.
>
> "In the Auditor's letter of May 2, 1901, above mentioned, addressed to the Assistant Secretary of

> War, it is stated that 'in compliance with your verbal request' certain memorandum copies of decisions of the Comptroller, dated March 27, 1901, and April 3, 1901, involving the construction of said Act of March 3, 1885, were inclosed, and it was shown that the ruling in the office of the Auditor for the War Department was as follows: 'It is held to be in time of war between April 21, 1898, and May 25, 1900, inclusive.'"—*51 Ct. Cls. 408, 411-2.*

It will be noted that the foregoing dates include the date of May 16, 1899, on which the property for which compensation was claimed was lost by the sinking of the transport. The Court of Claims held that claim must be presented to the accounting officers of the Treasury Department and that although it might be presented through the War Department, in so doing the claimant made the War Department his agent, not the agent of the accounting officers. The opinion says:

> "He may present his claim through the War Department, and generally speaking will no doubt do it that way, but in that case he makes the Department his agent to present the claim, and not the agent of the accounting officers to receive it." *51 Ct. Cls. 408, 423.*

But it was held that the requirement as to presenting claim to the accounting officers had been met. On this point, the opinion says:—

> "The claim was in legal effect presented to the auditor in May, 1901, when he wrote the Secretary that the Comptroller had decided that the period of the loss was in time of war." *51 Ct. Cls. 408, 425.*

And the opinion continues:

> "It is a reasonable inference from said letter that the Secretary's purpose was to present the claims of those officers who had suffered losses by reason of the said shipwreck, and though 'the request' referred to in the letter was a verbal one we

> can see no reason for saying it was any the less a valid presentation. *No formality need attend the presentation of the claims.*" *51 Ct. Cls. 408, 425.*

The opinion in *Newcomber's* case makes extended reference to *Booth's* case (*49 Ct. Cls. 699*), decided by the Court of Claims, without an opinion, during June, 1914.

The facts in *Booth's* case, as recited in *Newcomber's* case, show that no claim whatever had ever been made upon the accounting officers. The claim in *Booth's* case was for property destroyed in a storm at or near Ponce, P. R., during August, 1899. The following is from the opinion in *Newcomber's* case:—

> "It further appeared that on December 21, 1900, the Comptroller of the Treasury held that there could be no recovery under the Act of 1885 (*23 Stat. 35*), for losses in the storm of September 8, 1900, at Galveston 'or in the Porto Rico hurricane,' and the Auditor suggested that 'it is thought by this office that the only relief is by Congressional legislation.' After said decision nothing further was done by either the claimant or the War Department in the matter of Lieutenant Booth's claim until July 30, 1903, when, in answer to an inquiry from him the quartermaster informed the claimant that his claim was on file in the Quartermaster General's office 'awaiting Congressional legislation,' as there is no law known to this office under which such claims can be paid." *51 Ct. Cls. 408, 422.*

On the foregoing facts, the decision of the Court of Claims, as recited in the opinion in *Newcomber's case*, was that presentation of a claim to the accounting officers had been excused. This conclusion was based upon the principle stated in the following extract from the later opinion, where it immediately follows the statement of fact just quoted:—

> "The court therefore considered that inasmuch *as the accounting officers had declined to allow one or more claims for losses occasioned by the same hurricane and storm*, which had evidently been presented as shown by said opinion of the Comptroller,

> *it would have been a useless ceremony to present the claimant's claim*, and that under such circumstances he could come to this court." *51 Ct. Cls. 408, 422.*

All, therefore, which supported the jurisdiction of *Booth's* case by the Court of Claims, which held in his favor, was, as stated by the Court:

> "In the case of an identically similar claim for loss occasioned by the same hurricane and storm, or it may be in the very class of claims of which Lieutenant Booth's claim was one, the accounting officers had denied relief." (*51 Ct. Cls. 408, 422*).

The conclusions in the *Booth* and *Newcomber* cases render it most difficult to comprehend the reasons for the action of the Court of Claims in this case. The requirements of the Act of July 27, 1912, do not appear to be in any degree more extensive than those of the Act of March 3, 1885. Nor are those of R. S. 3226 more extensive, even if they are applicable. Appellant knew that claims of the class to which hers belongs, claims based upon facts having precisely the same legal effect as those involved in her claim, were uniformly being rejected by the Treasury Department.

But she knew more. She knew that the precise facts of her claim had been presented to the Treasury Department, in the claim made by New England Trust Company (*R. 34-5*) and in that made by the administrator with the will annexed (*R. 45-6*); had been considered upon their merits, no objection to the source of either claim having been suggested by any officer of the Treasury or any representative of the United States, and that both claims had been rejected and disallowed, the adjudicating officer definitely asserting that the money claimed was not refundable but had been lawfully collected and must be retained. In such circumstances it could have been no less a "useless ceremony" (*51 Ct. Cls. 408, 422*) to present another claim in her own name than it would have been in *Booth's* case.

There are many decisions to the effect that appeals under R. S. 3226 need not be made when previous action has shown that they would be denied. Thus it has been held that such an appeal is not required where the views of the Commissioner of Internal Revenue, upon the facts, have already been made known to the claimant. In *Weaver, Collector* v. *Ewers, 195 Fed. 247*, Judge Garland, speaking for the Circuit Court of Appeals for the Eighth Circuit said:—

> "Notwithstanding, however, the provision of section 3226 above mentioned, . . . we are of the opinion that, as the law does not require idle acts, the first ground of demurrer must be overruled, as the purpose and requirement of the statute above quoted has been fully met by the application for review of the assessment made to the Commissioner of Internal Revenue as set out in the petition. What the Commissioner of Internal Revenue thought about the assessment had been obtained upon full statement of the facts, and it would have been a useless form again, after the tax was paid, to appeal to the Commissioner and obtain the same judgment. The reason for the appeal did not exist, and hence the appeal after tax paid was not necessary." *195 Fed. 247, 249.*

See, also:

Swartzchild & Sulzberger Company v. *Rucker, 143 Fed. 656;*
De Barry v. *Dunne, 162 Fed. 961;*
San Francisco Savings & Loan Society v. *Cary, 21 Fed. 380, No. 12,317;* and
Tucker v. *Grier, 160 Fed. 611;*
Dodge v. *Brady, 240 U. S. 122, 125–8.*

This is a suit under the Act of July 27, 1912, *supra*. The first section of that act is understood to have been intended to relieve those whom it affects of the statutory limitation of two years after payment for filing claims with the Commissioner of Internal Revenue under R. S. 3220, that limit of two years being fixed by R. S. 3228.

Therefore, the reference to claims in the Act of July 27, 1912, must be understood to refer to the claims intended by R. S. 3220, R. S. 3226 and R. S. 3228. But long before July 27, 1912, the Court of Claims, and the Treasury Department, as already shown herein, had given broad and liberal definition to the term "claim" in connection with those sections of the Revised Statutes. Congress must have had these definitions in mind when the Act of July 27, 1912, was formulated. As no effort to narrow them appears in that Act, it seems to be necessary that appellant in this proceeding should be given the full benefit of an interpretation quite as liberal, if necessary to her relief, as that applied in the case of Mr. Justice Wayne (*26 Ct. Cls. 274, 276, supra, p. 27*). The constructions hereinbefore referred to are to be considered as establishing the meaning of the same term when used in 1912 in connection with the same subject matter (*McDonald* v. *Hovey, 110 U. S. 619; Henrietta Mining and Milling Company* v. *Gardner, 173 U. S. 123, 130; United States* v. *Cerecedo Hermanos y Compania, 209 U. S. 337; Latimer* v. *United States, 223 U. S. 501, 504.*)

The argument upon the merits of the case will be taken up at this point.

I.

There was never any lawful assessment of any Federal tax in respect of appellant's interest in the trust fund bequeathed to New England Trust Company.

Appellant received an interest in this fund which, if its actual or clear value exceeded $10,000.00 (legacies below $10,000.00 were exempt) was taxable under Section 29 of the Act of June 13, 1898 (*United States* v. *Fidelity Trust Company, 222 U. S. 158*).

Section 31 of the Act of June 13, 1898, made R. S. 3182, applicable to the taxes created by Section 29 of that Act and R. S. 3182 "required" the Commissioner of Internal Revenue—

> "to make the inquiries, determinations, and assessments of all taxes and penalties"

arising thereunder. The latter is applicable, *Dodge* v. *Osborne, Commissioner, 240 U. S. 118, 119–120.*

Soon after the passage of the Act of June 13, 1898, the Commissioner of Internal Revenue appears to have conceived the idea that it was not necessary to make particular "assessments" or "inquiries" as to certain of the taxes for which the new statute provided but that he was empowered to make the required "determinations and assessments" without special inquiry concerning particular cases and by groups or what may be termed "wholesale" methods. To that end the general rule set forth in finding V (*R. 28–33*) was promulgated on December 16, 1898. On the same date the Commissioner of Internal Revenue issued Treasury Decision No. 20,442, which is, in part, as follows:

> "Legacies in the nature of a life beneficiary interest and remaindermen's interest are both taxable. The values of said interests are to be determined by approved tables, which have been prepared by the Government actuary. The tables referred to are published in this issue of Treasury Decisions, as decision No. 20,443." *T. D. 20,442.*

The "approval tables," referred to in the foregoing, are those to be found in the finding by the Court of Claims—

> "under which rules, tables and instructions the said sum of $3,026.69 was determined to be the the proper tax under said Act upon the interest of this claimant in said trust under the will of said decedent and under which rules, tables, and instructions all taxes under said act upon like and similar interests were calculated." *Finding V, R. 28.*

The following "example," found on page 32 of the Record, constitutes a part of the general rule and illustrates the manner in which that rule was applied to the interest of appellant.

> "Example 2. A person dying bequeaths to his daughter, aged thirty-five years, a life interest in personal property amounting to $50,000.00, the estate to revert absolutely at her death to other parties. Required the present value, *at the date of* death of the testator, of the life interest of the daughter in the estate, . . .
>
> "At a net interest of *four per cent* per annum, *the assumed rate*, the estate of $50,000.00 will realize *an income or annuity* of $2,000.00 per annum. The *present value* of the sum of $1.00, payable at the end of each year during the life of a person aged thirty-five years, is found by the table to be $16.14437, and the *present value of an annuity of $2,000.00* for the same time would be two thousand times as much, or $32,288.74, the *amount on which the tax accrues.*"—*R. 32.*

Certain words in the foregoing have been italicized for the purposes of this brief. The last paragraph of the "example" will now be modified by the substitutions necessary to show how the rule was applied to appellant's interest.

> "At a net interest of *four per cent* per annum, *the assumed rate*, the estate of" $125,000.00 "will realize *an income or annuity* of" $5,000.00 "per annum. The *present value* of the sum of $1.00 payable at the end of each year during the life of a person aged" sixty-three "years, is found by the table to be" $8.46412, "and the *present value* of an annuity of" $5,000.00 "for the same time would be" five "thousand times as much, or" $42,320.60, "the amount on which the tax accrues."

Thus was appellant's interest "valued." In this simple fashion were all these "assessments" made. The only computation in the appellant's case, not explicitly pro-

vided for in the "example" was the deduction from $42,320.60, calculated as above, of the Massachusetts tax of $1,964.69 (*R. 34*).

In other words, for all the so called "assessments" made by the application of this rule it was conclusively "assumed" that four per cent would be earned by every trust fund and that future payments had a present *taxable* worth equal to the sum which, at four per cent per year, would produce them when due. Be it then remembered that by means of this general rule—

> "all taxes under said Act upon like and similar interests were calculated"—*Finding V, R. 28*,

and

> "there was *no specific investigation* by the Commissioner of Internal Revenue as to this claimant's expectancy of life or *as to the earning capacity of the trust fund* here involved otherwise than by the application of said tables. The value of claimant's inherited interest was determined from said tables . . ." *Finding VIII, R. 34*.

This general rule was enforced by the Treasury Department in such rigorous and undeviating temper that the interest of a legatee already deceased was "valued," and the "tax" collected, as though she would live for thirty years (*Kahn* v. *Herold, 147 Fed. 575, 583*), and that of a legatee who received an annuity charged on a fund sufficient to produce it at three and one-half per cent, was "assessed" as though four per cent of the fund would be paid instead of the smaller amounts directed by the will (*Peck* v. *Kinney, 143 Fed. 76, 77-81*).

There is no presumption of law that future payments can be discounted at any particular rate of interest or that the future duration of a life in being will coincide with average "expectancies" (*Louisville & Nashville* v. *Holloway, 246 U. S. 525*). Moreover "local conditions are not to be disregarded" (*Chesapeake & Ohio* v. *Kelly, 241 U. S. 485, 490*).

The term "present worth" belongs to the nomenclature of mathematics. It is a derivative of (1) an interest rate (known or assumed) and (2) a sum of money to be paid at a certain future date or sums to be paid upon certain future dates. At four per cent yearly $10,000.00 to be paid at the end of one year has a "present worth" of $9,615.38 because $9,615.38 multiplied by 1.04 (that is, increased by four per cent of itself) is $10,000.00. In different sections of the United States and upon different grades of security money has, in recent years, been loaned at rates at least as low as two per cent and as high as twelve per cent per year. The "present worth" of $10,000.00 to be paid in one year at each rate from two to twelve per cent per annum is shown below:

Interest rate per year, per cent.	Present worth of $10,000.00 to be paid at end of one year.
2	$9,803.92
3	9,708.74
4	9,615.38
5	9,523.81
6	9,433.96
7	9,345.79
8	9,259.26
9	9,174.31
10	9,090.91
11	9,009.01
12	8,928.57

The foregoing affords a very simple illustration of the arithmetical principle involved. It shows that in laying down the general rule and "assuming" the interest rate (perhaps, in this use, more properly to be termed a rate of *discount*) of four per cent the Commissioner of Internal Revenue controlled the "value" assigned to every future payment of definite amount. Moreover, by determining upon four per cent he assigned to every such payment an *higher* "value" that would have been assigned had he adopted an higher rate of interest. *The lower the*

rate of interest the higher must be the "present worth" of any future payment.

Ignoring for the purposes of the argument, at this point, other assumptions, involved in the general rule, which appear to be without warrant, it is observed that *the selection of the rate of discount to be applied to future payments controlled the amount of the tax demanded.* The lower the rate of discount selected the higher the burden of taxation that would result, for the "present worth" of future payments, as has been shown, increases as the rate of discount decreases. The amount at which the arbitrary general rule adopted by the Commissioner of Internal Revenue would have "valued" an annual income of $600.00 payable for thirty years is compared, in the following table, with the amounts that would have resulted if he had used different rates of interest.

If the Commissioner had used—	Present worth of one dollar payable at end of each year for thirty years.	Present worth of $600 payable at end of each year for thirty years.	Amount of tax.	
			If left to a lineal descendant.	If left to a stranger in blood.
2 per cent.....	$22.39346 (1)	$13,436.08	$100.77	$671.80
3 per cent.....	19.60044 (1)	11,760.26	88.20	588.01
4 per cent.....	17.29203 (2)	10,375.22	77.81	518.76
5 per cent.....	15.37245 (1)	9,223.47	nothing	nothing
6 per cent	13.76483 (1)	8,258.90	nothing	nothing
7 per cent	12.40904 (1)	7,445.42	nothing	nothing
8 per cent	11.25778 (1)	6,754.67	nothing	nothing

(1) *From "Robinsonian Complex Interest Simplified;" by J. Watts Robinson, Boston, published by the author, 1909.*

(2) From the general rule of "assessment" promulgated by the Commissioner of Internal Revenue (*R., 33*).

The figures in the table show that, within the limits of rates of interest commonly paid in commercial transactions in different sections of the country, if the Commissioner had the power he attempted to exercise, the legacy of $600.00 per annum *could have been made taxable or exempted from taxation.* The tax could have been augmented by the plausible expedient of lowering the discount

rate or reduced to nothing merely by choosing five instead of four per cent. A legacy of $550.00 per annum for the same period would have been taxable if three per cent were used, exempt with the use of four per cent. At five per cent a legacy of $1,500 per annum passing to a stranger in blood would have been "valued" at $23,058.68 and taxed $1,152.93; at three per cent the same legacy would have been "valued" at $29,400.66 and taxed (the rate being increased fifty per cent because the legacy was "valued" at over $25,000) $2,205.05.

Thus, this arbitrary general rule controlled the amount exacted from each person subject to the tax as fully as the rate of tax prescribed by Congress and, if it was in the power of Congress to delegate to the Executive Department, authority to make and to enforce such a rule, the power can be granted to the Executive to increase or to lower at will, without any change in the statute and independently of Congressional action, the revenue to be derived from such a tax.

The foregoing considered, it is submitted that the arbitrary general rule of assessment prescribed and followed by the Commissioner of Internal Revenue was an unlawful attempt to exercise exclusively legislative power and for that reason (and because it was arbitrary and general) no assessment depending upon it could be lawful. Of course, the Treasury Department was without power to increase the scope of its own authority by calling its action in enforcing the general rule, the exercise of the power to assess (*Waite* v. *Macy, 246 U. S. 606, 608-9, and cases cited*).

The undisputed effect of this rule was that there was no inquiry as to the actual or clear value of the interest at bar, or of any similar interest, but, in lieu of such inquiry, this interest, and every other interest of like character was "assessed" as though it had the actual or clear value which it would have had if it were (1) certain to produce an annual income for the use of the beneficiary precisely equal to four per centum of the fund

by which it was to be earned (regardless of the nature of the investments or the conditions of the trust), (2) certain that this income would be enjoyed by the beneficiary during exactly the number of years indicated by the selected mortuary tables (regardless of the actual state of health, the place of residence and the occupation of the beneficiary), (3) certain that beneficiary would be permitted to dispose of or anticipate all or any part of the expected income (regardless of the laws controlling or any conditions or restrictions in the grant) and (4) certain that all or any part of the expected income could be discounted at the rate of four per centum per annum.

This rule is complete in itself and speaks for itself. By prescribing and promulgating it the Commissioner of Internal Revenue seems to have said, in substance and effect—

> I will make no inquiry concerning the facts which determine the actual and clear value of any particular "life interest" to which the legacy tax provisions of the Act of Congress of June 13, 1898, may be considered to apply but I will arbitrarily assign to each and every such interest for the purposes of the assessment I am required to make a valuation equal to the arithmetical 'present worth' of an annuity equal to four per cent of the principal of the fund, each future payment being discounted at four per cent per annum, and payable during a period of years equal to the average expectancy of life, as shown by mortuary tables which I have selected, of persons of the age of the beneficiary.

Appellant has been unable to discover any foundation for this, or any other, arbitrary general rule of "assessment" in the taxing statute or in any statute. Section 31 of the Act of June 13, 1898, and R. S. 3182 required the Commissioner of Internal Revenue to make the assessments but no statute in terms or by necessary implication relieved him of the duty to ascertain "actual" and "clear values" by inquiry, no statute suggested that any fund should be assumed to earn income at the yearly rate of

four per cent or any other rate, no statute suggested that the actual state of health or other conditions affecting the probability that a beneficiary would achieve the average length of life indicated by mortuary tables should be disregarded and no statute suggested that a discount rate for future payments of four or any other per cent should be adopted. There is no reference in any Act of Congress in any way bearing upon this case to mortuary tables or to any percentage rate of income or discount.

Congress did not provide or attempt to provide this general rule of assessment, but if there was a lawful assessment in the case at bar it apparently must be that all the following are true—

1. That Congress had power to prescribe this rule,

2. That power to prescribe it could be delegated to the Commissioner of Internal Revenue, and,

3. That such a delegation was effectively made either (*a*) expressly or (*b*) by implication.

It may be thought by some that Congress, itself, could not create an *ad valorem* excise and then prescribe a general rule of assessment which disregarded real values, as this rule disregards actual and clear value, for the reason that such a rule would be so frequently and seriously arbitrary and unequal in its operation as to be obnoxious to the fundamental law of the Constitution. (*Knowlton* v. *Moore*, *178 U. S. 41; Brushaber* v. *Union Pacific*, *240 U. S. 1*). Such an argument is not necessary, however, in this case.

If Congress has power to make such a rule it is conceived to be so exclusively a legislative power that it could not be delegated.

All powers of Federal legislation are vested in the Congress of the United States and, although other departments may be authorized to do many things which the Congress might do and the line separating legislative from administrative discretion is not easily drawn, those powers

which are exclusively legislative in their character can never be exercised by any other agency.

Wayman v. *Southard*, *10 Wheat. 1, 41;*
Field v. *Clark*, *143 U. S. 649;*
Buttfield v. *Stranahan*, *192 U. S. 470;*
Union Bridge Company v. *United States*, *204 U. S. 364;*
St. Louis, Iron Mountain & Southern v. *Taylor*, *210 U. S. 281, 387;*
United States v. *Grimaud*, *220 U. S. 506.*

That the power to tax is in the strictest sense an exclusively legislative power is understood to be elementary.

> "This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only." *Rees* v. *Watertown*, *19 Wall. 107, 116; 22 L. ed. 72, 75.*

See also—

Heine v. *Levee Commissioners*, *19 Wall. 655; 22 L. ed. 223, 226;*
Merriwether v. *Garrett*, *102 U. S. 472; 26 L. ed. 197, 205-7;*
Thompson v. *Allen Co.*, *115 U. S. 550, 554; 29 L. ed. 472, 474-5;*
Spencer v. *Merchant*, *125 U. S. 345;*
Cooley on Taxation, Third Edition, pp. 99-100.

There is no difficulty in distinguishing between the legislative power to prescribe the general conditions under which citizens shall contribute to the support of government, defining the nature of the tax, its subject matter, the rates to be applied, and formulating all general rules by which the amounts exacted shall be determined on the one hand, and the *quasi*-judicial power of assessment which is necessary to its application, on the other. This is particularly true of an essentially *ad valorem* tax where the principal element in assessment is the determination

of the value to which the rates fixed by the legislature is to be applied.

Moreover, no assessing authority is ever permitted to adopt an arbitrary rule, or any general rule as to values, and apply such rule in lieu of making inquiry concerning the particular facts of each case:

McMillen v. *Anderson*, *95 U. S. 37, 43;*
Glidden v. *Harrington*, *189 U. S. 255, 259;*
Brooklyn City Railroad v. *State Board of Tax Commissioners*, *199 U. S. 48, 52;*
Keeney v. *New York*, *222 U. S. 525, 535.*

In the case at bar there was an uncertain income (the earnings of a fund), to be received during a still more uncertain period (the life of an individual), with a "present worth" controlled not only by these uncertainties but further complicated by local conditions affecting the discount rate. The extreme difficulty attending an effort to resolve all these elements in a determination of the "actual" or "clear" value, made by Section 29 the basis of the calculation of the amount of the tax, is undeniable. Here, then, was necessity for careful inquiry, earnest weighing of the several elements affecting value and, finally, for a conservative appraisement. But instead of an attempt to solve these difficulties, as they arose in particular cases, the Commissioner of Internal Revenue sought to evade them, for this and all similar cases, by proclaiming a general rule which he proceeded to apply, regardless of the facts, to every future right or payment and to every life interest. He made no exceptions and enforced this general rule so rigorously that in the present case he based his pretended assessment upon an annual income of $5,000.00, although the trust fund earned less than that (*R. 25*); upon the assumption that the trust began to earn income for appellant on June 6, 1900 (*R. 34*), although in fact it earned nothing until December 1, 1900 (*R. 25*); and upon the discount rate of four per cent although to discount the uncertain future payments at that rate would have been impossible.

The suggestion that power exists to confer such authority upon executive officers is, when the character of the power is examined and its magnitude recognized, so revolting to those who have been bred to respect the essentials of constitutional liberty that it must, apparently, be rejected as soon as stated. Either, however, Congress intended to delegate this authority to the Commissioner of Internal Revenue or did not intend to do so. If it intended to do so its effort was, as has been seen, to delegate a portion of its exclusively legislative power and therefore unconstitutional and of no effect; if it did not intend to delegate it, the Commissioner acted in violation of the form and purpose of the statute as well as in violation of the Constitution. In either case the pretended assessment was erroneous and illegal. There is, however, no word, line, clause or sentence in any Act of Congress to suggest that such a delegation was ever attempted or contemplated. No effort to show any express delegation has been made or will be made; if attempt is made to show a delegation by implication it will rest upon the shadowy and insufficient basis of the necessity for some assessment.

This attempt of the Commissioner of Internal Revenue to substitute estimates controlled by the use of an arbitrary general rule for lawful inquiries concerning the real or "clear" value of each particular interest falling within the scope of the taxing law was disclosed to the Supreme Court in *United States* v. *Fidelity Trust Company* (*222 U. S. 158*), as appears from the statement contained in the opinion in that case, but *its legality was not then before the Court and was not and could not have been passed upon*, as that suit did not involve the validity of a tax under the Act of June 13, 1898, but, solely, the question whether the interest of a certain legatee was a "contingent beneficial interest" within the intendment of Section 3 of the refunding Act of June 27, 1902, (*32 Stat. 406*). As the Court held that the interest taxed was not covered by the refunding act it was of no consequence, in that case, whether it had been lawfully assessed or not.

II.

Without a lawful assessment prior to July 1, 1902 (the date of the repeal of the tax), no tax was imposed and no obligation to pay arose and, therefore, nothing could have been legally collected or can lawfully be retained.

There are taxes which may be imposed without assessment or, possibly, it would be correct to say, by legislative assessment (*United States* v. *Erie Railway, 107 U. S. 1*). Certain Federal internal revenue taxes have been and are of this character (*infra, 49, 51*). In such cases particular assessment is so far unnecessary that (1) the United States may sue for and recover the amount due as a tax as for a debt or (2) the United States having obtained a sum of money from the taxpayer, the Courts, in an action for its recovery, may determine how much could lawfully have been assessed and authorize the retention of the sum thus determined upon. The latest and most far-reaching definition of these circumstances to be found in any decision of this Court appears to be that contained in the opinion by Mr. Justice Hughes, in *United States* v. *Chamberlin, 219 U. S. 250*, decided on January 3, 1911. The following is quoted therefrom:—

> "Whether an action of debt is maintainable depends not upon the question who is the plaintiff or in what manner the obligation was incurred, but it lies whenever there is due a sum either certain or readily reduced to a certainty." *219 U. S. 250, 262-3.*

There is authority for the view that the value of the interest of appellant cannot be "reduced to a certainty":

> "A life estate or legacy for life is the income or interest of a certain fund consisting of profits to be earned, which income is uncertain in amount. *It is*

not a fiexd sum, nor to be made a sum certain. Pearson v. *Chace, 10 R. I. 455; Whitson* v. *Whitson, 53 N. Y. 479* "

Peck v. *Kinney, 143 Fed. 76, 80.*

Appellant was entitled to the income of a fund during the uncertain period of her life. What it would annually earn has continued uncertain; how long she would live was even more uncertain. A "value" could be assigned to either of these uncertainties just as it is frequently necessary to weigh chances and probabilities and give definition to the result which best satisfies the judgment of those upon whom the task devolves. But chance is not reduced to certainty by such a process—in truth the closest approximation to certainty evolved is that the actuality will not coincide with the estimate. Except the future duration of an existing life, scarcely anything more surely eludes foresight than the future interest rate to be earned by sound investments. In other words, the "present value," for taxation purposes or for any other purpose of a life interest in a trust fund is never certain or ascertainable—it is a matter of opinion and judgment—its estimation involves questions and problems on which the wisest and most experienced may reasonably disagree. In such case, it is submitted, every taxpayer is entitled to a particular assessment, based upon examination of the particular facts and involving the exercise of the sound discretion of those upon whom the duty of assessment lawfully devolves. Unless it can be that the fundamentals of State taxation differ radically from those of Federal taxation, it must be that this has already been determined by the final authority for—

> "The Fourteenth amendment . . . requires that . . . the citizen . . . shall not by arbitrary and discriminatory provisions, be denied equal protection."—*Keeney* v. *New York, 222 U. S. 525, 535.*

The duty of assessment in such cases is not placed upon the courts, the processes of litigation are not those

by which it is properly to be performed. When there may easily be as many different conclusions as there are individuals whose judgment is required, the taxpayer is thought to be entitled to the particular judgment of those designated by law to make the assessment.

> "A tax, when assessed by valuation, may be made unequal and oppressive by the unfairness with which the valuation is made. . . . Value is matter of opinion, and when the law has provided officers upon whom the duty is imposed, to make the valuation, it is the opinion of those officers to which the interests of the parties are referred. The Court cannot sit in judgment upon their errors, or substitute its own opinion for the conclusions the officers of the law have reached. *Cooley on Taxation, 3d ed., p. 385.*

There is conceived to be a plain line of separation between those taxes which (1) must rest upon a valuation necessarily involving the exercise of judgment and (2) those either specific in form as well as substance or which, while *ad valorem* in form, depend upon values that are so fixed or certain that the tax is actually specific in its intrinsic character. This separation has often been judicially noted and applied as the test for determining whether particular assessment should be required. The distinction has been admirably stated in words later adopted by the Supreme Court of Vermont, as follows:

> "But in the case of taxes laid upon solvent securities, certificates of deposit, mortgages, undivided profits, or the like, *the nominal or face value of which is identical with the actual value*, the assessment may be made by the legislature without the intervention of assessing officers. *27 Ency. Law 663.*" *State* v. *Clement National Bank, 84 Vt. 167, 182.*

It will be noted that *the identity of the face value and the actual value* is made the basis of the definition and the test of the power of the legislature to make assess-

ment. The distinction is also recognized in *Hager* v. *Reclamation District, 111 U. S. 701*, where it is coupled with discussion of the concurrent right to notice of the assessment proceedings. Mr. Justice Field, speaking for the Court, said:—

> "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or restaurant or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.
>
> "But where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, . . ." *111 U. S., 701; 28 L. Ed. 569, 572.*

The instances in which it has been held that taxes have been lawfully imposed without assessment all seem to illustrate the rule that this is permissible only when the taxes are specific or a percentage of a value necessarily certain and definite—where the nature of the thing taxed leaves no room for, or purpose to be served by, a valuation. Thus in *Dollar Savings Bank* v. *United States, 86 U. S. 227*, the majority of the Supreme Court held, over the objection of Mr. Justice Field and Mr. Justice Bradley who believed that under all circumstances and without exception "the assessment roll should be regarded as conclusive as to the persons or things liable to taxation," that a bank tax of five per cent "on all undistributed sums made and added during the year to their surplus or contingent fund" (*Act of July 13, 1866, 14 Stat. 98, 138*) did not require "other assessment than that made by the statute."

Mr. Justice Strong, for the majority of the Court, said:

> "There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank and without more it made the bank a debtor."—*86 U. S. 227; 22 L. Ed. 80, 83.*

In *King* v. *United States, 99 U. S. 229; L. Ed. 373, and in United States* v. *Erie Railway, 107 U. S. 1; 27 L. Ed. 385*, the tax as to which it was held that "no other assessment than that made by the statute was necessary" was one of five per cent upon the amount of interest paid upon the mortgage bonds of railway companies (*Act of July 13, 1866, 14 Stat. 98, 138*). In *United States* v. *Philadelphia & Reading, 123 U. S. 113*, it was apparently taken for granted that the same rule applied to a tax on the amount of undivided profits (*Act of June 30, 1864, as amended by Act of July 13, 1866, 13 Stat., 223, 284; 14 Stat., 98, 138*). The only additional case, prior to *Chamberlin's case, supra*, is *United States* v. *Ferrary, 93 U. S. 625; 25 L. ed. 832*, in which it was held that liability for a tax of fifty cents per gallon on eighty per cent of the capacity of a distillery, as shown by an official survey and estimate, a copy of which must be furnished to the

distiller (*Act of July 20, 1868, 15 Stat., 125, 127*), was within the same principle.

> "The law fixed the rate at fifty cents for each gallon of spirits produced, and the survey and estimate which was furnished him informed him of the producing capacity of his distillery, and made it his duty to pay the tax on at least eighty per cent of that. Thus the law fixed both the *rate* and *amount*." *93 U. S. 625; 23 L. ed., 832, 833.*

This, of course, in very different from the legacy to appellant, involved in this case, of the uncertain income to be earned during her life, of uncertain duration, by a trust fund of $125,000. Thus, in the case at bar, the law fixed the *rate*, but the *amount to be paid* was not fixed until the *amount to which the rate must be applied* was determined and the latter was determinable only by a valuation, that is by an assessment.

Diligent examination of the cases has not led to the discovery of any decision which is not in harmony with the foregoing unless *United States* v. *Tilden, 9 Ben. 368; 28 Fed. Cas. 161, No. 16,519*, might be so considered. It does not appear inconsistent with the principle herein urged, except possibly in some expressions that do not seem to relate themselves to the matters really determined. But it is noted that Tilden's case was decided in the District Court for the Southern District of New York during the year 1878 and has been cited in but one opinion from this Court and was never cited in any such opinion until thirty-three years thereafter (*United States* v. *Chamberlin, 219 U. S. 250, 263*). If Tilden's case must be considered as declaring that the United States have a power to tax which is essentially different from the power to tax possessed by the States, so that the Federal power may avoid the constitutional requirements as to notice and assessment, it is not thought to be consistent with the views of this Court as repeatedly expressed. It is quite true that the decision went very far in that direction:—

> "A scheme of taxation like that found in the Federal statutes, where there is imposed, by the statute

> a fixed tax, by a percentage on an amount of money, the elements for ascertaining which are definitely designated in the statute, or a fixed tax of a given amount on a designated object or subject of tax, is *a very different scheme of taxation* from that which prevails generally in the States, where power is confided to public officers to value property, real or personal, and to fix the percentage of tax thereon. *There no tax is imposed till the officers act*, and no suit for any tax will lie till after such action by the officers." *United States* v. *Tilden*, *28 Fed. Cas. No. 16519, 161, 168.*

It is submitted that the Fifth Amendment to the Constitution, in guarantying to every citizen that his property shall not be taken without due process of law, protects every citizen upon whose property of uncertain value an AD VALOREM tax is laid in the right to have its value ascertained, for the purposes of the tax, by a quasi-judicial inquiry. The denial of such an inquiry and the application of the statutory rate of taxation to an arbitrary estimate or "valuation" obtained in any other manner is believed to violate the Constitutional rule. Of course, it is recognized that there are many conditions under which values are so certain or so readily ascertainable that the tax which is *ad valorem* in form is in all its essentials a specific tax. But this could scarcely be asserted of an interest depending upon the duration of human life or of a "value" not measurable save by the prediction of a future interest rate.

> "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'" Concurring opinion of Mr. Justice Bradley in *Davidson* v. *New Orleans*, *96 U. S. 97, 104; 24 L. Ed. 616, 620-21;* Quoted with approval in *Hagar* v. *Reclamation*

District No. 108, 111 U. S. 701; 28 L. Ed. 569, 572; see also, *Murray's Lessee* v. *Hoboken Land and Improvement Company, 18 How. 272; Embree* v. *Kansas City Road District, 240 U. S.—.*

What constitutes due process of law in matters of taxation was stated by Mr. Justice Field, speaking for the Supreme Court in *Hagar* v. *Reclamation District No. 108* (*111 U. S. 701*), in part as follows:

> "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; . . ."

In the case at bar the "end to be attained" was the ascertainment of the "actual" or "clear" value, using the words of Section 29, of appellant's right to receive the indefinite income of a trust fund during the still more indefinite period of her life. The method adopted was not "adapted" to that end, the assessing officer refused to act "judicially," and "upon such evidence" as he might have obtained, he sought no evidence, made no inquiry concerning the nature of the investments and income of the trust fund, but instead of, and to avoid so-doing he assumed the power to formulate a general rule which took no account of the actual facts.

There was perhaps never a similar attempt on the part of any administrative officer of the Federal government to substitute a general regulation, in the nature of legislation, for the inquiry as to "actual" or "clear" value required by a taxing law. But in states in which taxes are required to be proportioned to value, there have been numerous legislative attempts to set up arbitrary standards in lieu of constitutional assessments and these have been uniformly condemned by the courts.

Hawkins v. *Mangum, 78 Miss. 97, 28 So. 872.*

Board of Assessment v. *Alabama Central Railroad, 59 Ala. 551.*

Reelfoot Lake Levee District v. *Dawson*, *97 Tenn. 151; 35 S. W. 1041; 34 L. R. A. 725.*
State v. *Railroad Corporations*, *4 S. C. 376.*
Williams v. *State Board of Assessors*, *51 N. J. Law 512; 18 Atl. 750.*
Atlantic & N. C. R. R. v. *Board of Commissioners*, *75 N. C. 474.*
People v. *Hastings*, *29 Calif. 449.*
McCurdy v. *Prugh*, *59 Ohio St., 455; 55 N. E. 154.*
Keeney v. *New York*, *222 U. S. 522.*

"The mode of assessing tax in the States by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done."—*McMillen* v. *Anderson*, *95 U. S. 37, 43.*

It is now urged that the requirement of Section 29 of the Act of June 13, 1898, that the tax rates therein named shall be applied to the "clear value" of the interest taxed, is at least as binding upon the Commissioner of Internal Revenue as a state constitution upon the legislature of the state.

This case, then, is not one in which the assessing officers have committed errors of judgment, in the effort in good faith to assess legacies at their clear value, as the statute and the Constitution (as to such an essentially ad valorem tax) are believed to require. But it is one in which those officers have refused to acquaint themselves with the facts affecting value or to exercise their judgment upon the particular facts of particular cases. To such exercise of judgment every citizen from whom an ad valorem tax is demanded is entitled.

"Various elements enter into and affect an opinion respecting the value of a given piece of property, and all that could be required is that the assessing board exercise an honest judgment, based upon the information it possesses or is able to require." *Brooklyn City Railroad* v. *State Board of Tax Commissioners*, *199 U. S. 48, 52.*

The foregoing describes merely what is the ordinary and established "due process of law" in the assessment of such taxes. Scarcely will any one suggest that the citizen, whose property or right is assessed for the purposes of an essentially *ad valorem* tax, is not fully and always entitled to all which the foregoing extract says that he may require. The arbitrary character, as well of the other administrative acts which a decision sustaining the Constitutionality of the executive order involved in the case at bar would seem inevitably to sanction as of that order itself, warrants reference to the admirable statement of the reasons for strict adherence to the safeguards of the organic law, in such cases, made by Judge Cooley in the preface to the first edition of *Cooley on Taxation:*

> "But when one considers how vast is this power, how readily it yields to passion, excitement, prejudice or private schemes, and to what incompetent hands its execution is usually committed, it seems unreasonable to treat as unimportant, any stretch of power—even the slightest—whether it be on the part of the legislature which orders the tax, or of any of the officers who undertake to give effect to the order. . . . And as the benefits of republican government have been reached through the efforts of the people to establish and maintain the legitimate restraints upon the power to tax, it seems unwise in a high degree to slight or disregard any of the checks which the law has provided, whether those which are intrusted to the hands of the judiciary, or those which are the lawful right of the people themselves who are to bear the burden of the particular tax." *Cooley on Taxation, Third Edition, p. IV.*

Considering it to have been shown, therefore, (1) that there was never a lawful assessment in respect of the interest of appellant and (2) that particular assessment was required the inquiry yet to be made is *whether the United States have any present right to retain any portion of the amount for which suit was brought.*

Consideration of the foregoing proposition involves Sections 7, 8 and 11 of the repealing Act of April 12, 1902 (*32 Stat. 96*) and, perhaps, of Section 13 of the Revised Statutes. Section 7 of the Act of April 12, 1902, *supra*, repealed Section 29 of the Act of June 13, 1898, and all amendments thereto; Section 11, of the same Act, made the repeal effective on July 1, 1902, and Section 8 excluded from the repeal or "saved"—

> "all taxes or duties *imposed* by Section 29 of the Act of June 13, 1898, and amendments thereof, *prior to the taking effect of this Act.*"

It has been considered, but apparently it has not been decided (*Hertz* v. *Woodman*, *218 U. S. 205, 216-8*) that R. S. 13 might have some effect in perpetuating any *liability actually incurred* under Section 29 of the Act of June 13, 1898. This section reads:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." *R. S. 13.*

This statute was enacted in order to avoid the consequences of the common law rule that—

> "*an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations*, and as a remission of penalties and forfeitures *dependent upon the destroyed statute.*" *Hertz* v. *Woodman*, *218 U. S. 205, 216, and cases there cited.*

The present significance, if any, of R. S. 13, is as follows:—

> "That if, prior to the repealing act, the defendants in error* were under any liability or obligation to pay the tax or duty imposed by Section 29 of the

* The word "appellant" should, of course, be substituted for the purposes of the instant proceeding, for the term "defendants in error."

> Act of June 13, 1898, that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the saving clause in the repealing Act, unless the special character of that clause, by plain implication, cuts down the scope and operation of the general rule in Section 13." *Hertz* v. *Woodman, 281 U. S. 205, 218.*

But "*liability*" for a tax is incurred by the "*imposition*" of the tax, it is not seen that it could be incurred in any other way.

> "Therefore we must take that general saving clause* into consideration as a part of the legislation involved in the determination whether a '*liability*' *had been incurred by the imposition of a tax* prior to the Act that destroyed the law under which it had been imposed." *Hertz* v. *Woodman, 281 U. S. 205, 218*

It would appear that, as the saving clause of the repealing Act of April 12, 1902, *supra*, preserved the right to collect all taxes "*imposed*" under Section 29 prior to July 1, 1902, and R. S. 13, at the most, could only preserve the right to collect taxes *liability* for which had been *incurred* by their *imposition*, the latter adds nothing whatever to the former.

> "The provisions of the repealing Act of April 12, 1902, were such that the tax was to be discontinued on July 1, of that year, but without affecting its collection where the right to it became fixed before that time." *United States* v. *Jones, 236 U. S. 106, 113.*

The whole question revolves, therefore, *upon the meaning and application of the word* "*imposed*," the fifth word in the *special saving clause* of the repealing Act of April 12, 1902.

Was any tax "*imposed*," prior to July 1, 1902, with respect to the interest of appellant?

If not, the saving clause was ineffective as to this in-

* The reference is to R. S. 13.

terest; the repeal of Section 29 was "an unqualified repeal," so far as appellant is concerned, and as to her interest, the common law rule (*Hertz* v. *Woodman, 218 U. S. 205, 216*) that such a repeal extinguishes imperfect obligations should be applied.

Assuming that the preceding propositions, as to the invalidity of the general rule, under which the only "assessment" ever attempted as to this interest, are correct, it follows that *there was no assessment prior to July 1, 1902.* In that case the inquiry becomes—

Was any tax in respect of this interest "imposed," under Section 29 of the Act of June 13, 1898, before there was a lawful assessment?

This question was long ago judicially answered in the negative in a decision from which appeal was not taken (*Farrell* v. *United States, 167 Fed. 639*).

Assessment by *quasi*-judicial processes is *required in many cases* and is *permissible in all cases.* Any other method of fixing the amount of a tax is of limited application and may not be adopted outside of its restricted field. The extent of this field has already been discussed herein (*supra, pp. 47, 49, 53, 56*).

The attempt has already been made, in this brief, to show that appellant's interest required *quasi*-judicial assessment. This Court in *People* v. *Weaver, 100 U. S. 539*, adopted the words of Judge Cooley (*Cooley on Taxation, First Edition, 258-9*) in order to say:—

> "When taxes have been properly decided upon, *an assessment may become an indispensable proceeding in the establishment of any individual charge,* against either person or property. This is *always requisite when the taxes are to be levied in proportion to an estimate either of values, of benefits, or the results of business.*" *100 U. S. 539, 545.*

In the second edition of his great work, the last which he was able personally to revise, Judge Cooley reiterated the principle as follows:

> "*An assessment, when taxes are to be levied upon a valuation, is obviously indispensable.* It is

> required as *the first step in the proceedings against individual subjects of taxation*, and is *the foundation of all which follow it*. Without an assessment they have no support and are nullities." *Cooley on Taxation, Second Edition, 352.*

The foregoing is repeated *verbatim* in the third (*and last*) edition (*p. 597*).

Professor McGehee, after an admirable review of the decisions, states the rule as follows:—

> "But the legislature may adopt a different course, leaving such questions for determination by the officials charged with the execution of the taxing laws, who *act in a judicial or quasi-judicial capacity and must proceed on notice and hearing.* This is necessarily the case, when, instead of a specific, an *ad valorem* tax is selected. Then *before an individual liability for the tax can arise, it is essential that there be an assessment* of the property to be taxed, and an apportionment of the tax in accordance with the valuation determined by assessment and the rate of taxation." *L. P. McGehee, Due Process of Law Under the Federal Constitution, 1906, p. 236.*

This rule is asserted in both the great encyclopedias of jurisprudence.

> "The assessment is *an indispensable prerequisite to the validity of a tax* against any individual; for without a valid assessment there can be no lawful attempt to collect the tax or to enforce it against any specific property." *37 Cyc. 987.*

> "In laying an *ad valorem* tax, a valuation of the property of each person or corporation liable to be taxed is *an absolute necessity.* In no other way can the amount to be paid by each taxpayer be ascertained. *A valid assessment, is, therefore, indispensable.* This doctrine is as old as the law of taxation, and is *the one proposition on which all the courts and writers are agreed.* It is upheld by all the courts, State and Federal, as that *without which there cannot be a valid charge for a tax.*" *27 Amer. & Eng. Ency. of Law, 2d Ed. 660-1.*

Only a few extracts from the mass of decisions to the same effect will be presented; they follow.

> "The tax of a citizen is the result of the rate, applied to the value of the property which he owns, and *he is not taxed until the rate is thus applied*, by some legal mode of adjustment; *no duty of payment arises*, no proceeding to collect can be sustained, until *the tax is thus created*. Certainly that cannot be regarded as a valid assessment of an *ad valorem* tax . . . when, in fact, there is no adjudication as to actual value." *Commonwealth* v. *Lehigh Valley Railroad, 104 Pa. 89, 101-2.*
>
> "The question whether the taxes laid under authority of the State can be collected in this suit depends upon the question whether they were lawfully assessed. . . . The assessments, being unlawful, created no lien upon the land. Those taxes, therefore, cannot be collected, . . ." *Van Brocklin* v. *Anderson, 117 U. S. 151, 180.*
>
> "*A valid assessment is*, of course, *indispensable* as a prerequisite to levying a valid tax." *Western Union* v. *Howe, 180 Fed. 44, 51.*
>
> "*Unless an assessment is made*, as provided by law, *no foundation is laid for the collection of the tax.*" *Custer County* v. *Anderson, 68 Fed. 341, 342.*
>
> . . . . . .
>
> "During the period when, by law, property was to be valued for taxation purposes and a tax assessed, these steps were not taken. . . . The defendant, upon finding upon the annual record no valuation of his lot, was under no obligation to make any application to the taxing officers. It was not a case for correction; for there could be nothing to correct when there was no valuation for assessment. The subsequent apportionment, in November, 1883, of values and taxes, howsoever done, was ineffectual to validate previous proceedings, or to supply the defects, by which defendant's lot escaped assessment.
>
> "The only conclusion to be reached is that *there was a failure to impose any tax* for the year 1883,

and, therefore, the proceedings for the sale of the land were void." *May* v. *Traphagen, 139 N. Y. 478, 481-2.*

See, also:

California v. *Central Pacific, 127 U. S. 1;*
Supervisors v. *Stanley, 105 U. S. 305, 308;*
Delaware, Lackawanna & Western v. *Pa., 198 U. S. 341, 358;*
Londoner v. *Denver, 210 U. S. 373, 386;*
Powder River Cattle Co. v. *Commissioners, 45 Fed. 323, 328-9;*
State v. *South Penn Oil Co.* (*West Va.*) *24 S. E 688, 697.*

It is submitted that the law devolved upon the Commissioner of Internal Revenue the duty, if appellant's interest had an "actual value" in excess of $10,000.00, of determining the tax due therefrom, prior to July 1, 1902, by means of a lawful assessment. The Commissioner having misapprehended his functions and failed to take the necessary steps it is now too late and there is no authority competent to impose upon appellant any tax in respect of this interest.

The second section of the Act of July 27, 1912, requires the Secretary of the Treasury to refund taxes illegally or erroneously assessed or collected under color of the Act of June 13, 1898. If appellant is correct in the preceding contentions, namely, (1) that there was never a lawful assessment in respect of her interest in the estate of Edmund Dwight; (2) that it was an interest requiring quasi-judicial assessment and (3) that authority to make such an assessment expired on July 1, 1902, the whole sum taken from her was erroneously and illegally assessed and collected. As the Treasury Department refused to make the refund it may be enforced in this proceeding (*United States* v. *Hvoslef, 237 U. S. 1*).

III.

If it can be held that any part of the sum collected should be retained, it is at least true that there has been no lawful determination of any tax due to the United States. Unless there can be such a determination on the present Record, the suit should be remanded to the Court of Claims for additional findings.

It is submitted that by reason of the adoption and application of the arbitrary general rule of assessment, a valuation in excess of the actual and clear value was arbitrarily assigned to the interest of appellant and an excessive tax in respect thereof was arbitrarily and unlawfully assessed and collected. The Act of June 13, 1898, proportioned the tax for which it provided to the "actual" and "clear" value of taxable legacies. The government contended below that this interest had the actual and clear value of $40,355.91 but offered no evidence that this was a correct valuation, merely asserting that such is the estimate resulting from the application of the general rule adopted and used by the Commissioner. And, when that rule is analyzed, it appears that the result stated would not be accurate unless, among other things, her annual income from the legacy was $5,000, and she could dispose of and anticipate all expected income at a discount of only four per centum per annum. The proof shows that neither of these conditions existed. Of the twenty-nine payments to her disclosed by the Record (*R. 25*) all but five were at a rate of less than $5,000 per year. Twelve were at the rate of $4,375 per year which, using all the other figures found in the Commissioner's arbitrary general rule of assessment, would have resulted in a valuation of $35,065.83 and a tax of

$2,629.94 and eleven were at the rate of $4,687.50 which, in the same manner would have given a valuation of $39,375.56 and a tax of $2,828.32. The calculations resulting in the foregoing would have been as follows:

	Annual Income $4,375.00	Annual Income $4,687.50
Value of $1.00 of annual income (*R. 30*).....	8.46\frac{113}{1000}$	8.46\frac{113}{1000}$
Product of the two items above.....	$37,030.52	$39,675.56
Massachusetts tax (*R. 36*).....	1,964.69	1,964.69
Balance (value assigned).....	$35,065.83	$37,710.87
Tax "assessed".....	$2,629.94	$2,828.32

Appellant's income did not begin until months after it was assumed, for the purposes of the "assessment," to begin (*R. 25, 34*).

Moreover, and from a broader point of view, it seems absurd to assert that even the certainty of possessing a particular sum of money at some particular future date has an actual or clear value equal to the sum which if presently possessed and placed at interest at current rates would produce the expected sum upon the date of its anticipated receipt. Whoever, possesses (say) $50,000 today may place it at interest and a year from to-day have $51,750 (assuming a rate of interest of three and one-half per centum per annum), but he may also, if he has the capacity, invest it in some business and double, treble or quadruple it within an even shorter period, or he may use it to satisfy immediate necessities or desires. It is unreasonable to deny value to these options. But the pretended assessment in this case, and in all similar cases under the arbitrary general rule adopted by the Commissioner, not only denied value to them but it assumed certainty where certainty did not at all exist; where every element was fraught with the utmost uncertainty. The appellant had, at the most, *only a calculable chance* of receiving the income on which the Commissioner based his

"assessment." And this was a tax which the statute creating it declared should be laid upon "clear value" and "actual value" and deducted from the legacy or distributive share on account of which it was exacted.

"Present worths," amounting as they do to "somewhat speculative valuations" (*Manufacturers Railway* v. *United States*, *246 U. S. 457, 494*), ought not to be considered proper bases for taxation, especially when the law says "clear" and "actual" values are to be the basis (*Lynch* v. *Union Trust Company*, *164 Fed. 161, 167*).

The law sanctioned no tax that could not be deducted from something immediately payable. Although the clause providing that in every case the tax should be deducted from the particular legacy or distributive share on account of which it was paid, was added to Section 30 by amendment of March 2, 1901, this Court has declared that the same meaning was conveyed by Section 29, as originally enacted.

> "These provisions harmonize with the meaning which we have ascribed to Section 29, since they clearly import that the tax is to be deducted from a beneficial interest which the beneficiary was entitled to enjoy, and from which, before payment or distribution, a deduction of the duty was to be made." *Vanderbilt* v. *Eidman*, *196 U. S. 480, 494.*
>
> See also *Knowlton* v. *Moore*, *178 U. S. 41, 66-7.*

The trust created by the will of Edmund Dwight was to determine when neither appellant nor any of her children survived to enjoy the income therefrom, and, thereupon, the whole principal of the fund, that is to say $125,000 was to pass to and become the absolute property of the President and Fellows of Harvard College. Neither appellant nor any individual was ever to receive, under any circumstances, a dollar of the principal of the fund. The legacy of the remainder interest was for educational uses and therefore would have been exempt from taxation even had Section 29 not been repealed (*Act of March 2, 1902, 31 Stat. 946; Act of June 27, 1902, Section*

1, 32 Stat. 406). Hence whenever the trust should determine Harvard College was entitled to receive, without diminution by taxation, the entire sum of $125,000, as provided by Mr. Dwight. No one had a right to diminish this untaxable legacy in order to use the amount substracted therefrom to pay a tax imposed upon an interest passing to appellant. Therefore there was no lawful authority to diminish the principal of the trust fund in order to pay the Federal tax.

It necessarily follows that whatever tax could lawfully have been assessed must have been such as could be deducted from the income of the trust fund. But the trust fund did not exist until October 1, 1900, and it could earn no income until it was established. The pretended assessment of a tax of $3,026.69 during September, 1900, antedated the existence of any fund or legacy from which the tax could be deducted and for that reason, if there were no other, could not have been a lawful assessment. Moreover, it is evident, that the fund from which the tax must be deducted is, by that fact, indicated unmistakably as the fund to which the liability for the tax must attach, whenever such liability exists. The validity of this reasoning is sustained by consideration of the consequences which must follow the only other conclusion that is possible, namely that, although it must be deducted from the income, the tax was intended to be calculated with reference to the principal of such a fund. Appellant had reached an age, at the death of her testator, at which her expectancy of life, as estimated in mortuary tables, was not great and the estimated value of her life interest was correspondingly reduced. No rule, however, could properly be applied to her interest which would not be practicable in the case of younger beneficiaries of similar bequests. A proposed construction of a taxing statute that could not be applied to all conditions that would probably arise must give way to one capable of general application. A testator might, for example, provide a trust fund of $125,000 for an adopted son of the age of ten years, such child to

receive the income during life and the trust fund to pass to a charitable use upon his death. Applying to such an interest the formula provided in the arbitrary general rule of assessment adopted by the Commissioner, would have resulted in a tax of $7,295.10 which, even if the fund produced four per cent, would exceed the first year's income by $2,295.10. Or take the supposed case of a fund of $2,000,000 left in trust in the same manner, to a stranger in blood aged twenty years, with remainder to charity. The Commissioner's method would have "valued" the life interest at $1,476,030.40 and "assessed" a tax thereon of $221,404.56. Under the conditions that prevailed in 1900 and 1901 such a fund could scarcely have produced as much as three and one-half per cent or $70,000.00 per year, but if it had produced four per cent or $80,000.00, the beneficiary would have had to go for nearly three years without any income whatever in order to pay the tax out of the income.

Appellant might have found herself unable to raise funds to pay this tax. Or any of the legatees in any of the assumed cases might have concluded that it was not worth while to wager the present amount demanded as a tax against the contingency of receiving a larger aggregate of future income. Such a legatee might consider the odds provided in the arbitrary general rule of assessment to be incommensurate with the chances actually against him. The renunciation of a legacy under such conditions, during the time that the tax was in force, would have caused the fund to pass immediately to the person or corporation ultimately entitled. If such passing was not taxed under the statute, as in the case at bar, the fund would pass undiminished or, if such passing were taxable, the Government would be entitled to a tax of an entirely different and usually a much larger amount. These considerations indicate the insuperable difficulties which must attend any effort to find in the "present unity" of a life interest in the income of a fund any "actual" or "clear" value, taxable under the Act of June

13, 1898, in excess of the income actually paid to the legatee or at any time other than the actual time of such payment.

Persuasive, also, is the fact that no more income is certain than that which is actually paid to or actually accrues to the use or benefit of the life tenant. If the "present worth" of such an interest, calculated by the use of mortuary tables, were to be taken as the basis of taxation it is evident that the same fund might be successively taxed in the hands of successive beneficiaries, each paying more for the privilege of succession than he obtained as income from the fund. Thus, in Vanderbilt's case (*196 U. S. 480*), as fully set forth in the opinion of the Supreme Court, there were four named beneficiaries, two sons and two daughters, whose rights in the trust fund were to succeed in the order of their ages (except as to the daughters, who were to take equally), and in case of the death of all of them before the trust determined the decedent would have been intestate as to his residuary estate—presumably it would have passed under the intestate laws to his widow. The ages of these four children were not stated in the opinion, but Alfred G. was twenty-two at his father's death, and, for the purposes of the example, it will be assumed that the ages of the others were 20, 18, and 16, respectively. Now, suppose the fund had been put in trust for the life of whoever of these should eventually survive and the rights to income only bequeathed, the eldest to take first, on his death the next eldest, and so on. Then suppose Alfred G. had paid the tax on the estimated present worth of his rights to receive income during his full "expectancy of life," and then died; then the next beneficiary had so paid and died, and so on, all finally dying, and the whole residuary personal estate passing to the widow. A simple calculation, using the figures contained in the mortuary tables and the "present worth" tables for annuities promulgated by the Commissioner of Internal Revenue, shows that the taxes

demanded and collected on the Government's present theory would have been—

On account of Alfred G. Vanderbilt's rights	$310,834.32
On account of Reginald C. Vanderbilt's rights	315,038.50
On account of Gertrude Vanderbilt's rights	318,971.19
On account of Gladys Moore Vanderbilt's rights	322,642.13
Total collected	$1,267,486.14

The amount of the residuary estate was $18,972,117.46; if it produced four per cent the yearly income was $758,884.70, and it was taxed on that assumption. So if the above rights had been taxed in the way suggested and had all determined within a year, the widow's exempt share would have been depleted by the difference between $1,267,486.14 and $758,884.70 or $508,601.34. This is the *reductio ad absurdum* of the Government's theory. Will Government's counsel say that the deaths could not have occurred so closely together and in such succession? Or will he assert that if they had, the theory he supports would not have worked out in the way indicated?

Such interests as those under discussion, including the interest presented by the case at bar are not "contingent" within the terms of the Act of June 27, 1902. On the contrary they are present unities in the enjoyment of the life tenant (*United States* v. *Fidelity Trust Company*, *222 U. S. 158, 160*). Recognition of this principle is, however, in no way inconsistent with confidence that Congress never intended to tax such interests, save as taxable sums from time to time accrued to the use or benefit of the life tenants. To conclude otherwise would be to conclude that Congress "expressly commanded that to be done which it was impossible should be done," namely the deduction of the amount of the tax from a sum smaller than the tax. Such a possibility has heretofore been assigned as a reason for a different construction.

> "In other words, the act expressly commanded that to be done which it was impossible should be

> done compatibly with any hypothesis that the tax was on the whole personal estate, for, as we have seen, under that assumption the deduction of the tax from the whole estate was essential." *Knowlton* v. *Moore*, *178 U. S. 41, 69; 44 L. ed. 969, 981.*

In the case at bar appellant, the legatee, was obliged before she had received any income, before the trust fund provided to her use was set aside, and before any income had been earned or had accrued to her use or benefit, to provide $3,026.69, more than three-fifths of a year's income, to pay the pretended legacy tax. It is submitted that this result could not have been intended by Congress.

If, however, the interest of appellant in the estate of Edmund Dwight was taxable under the Act of June 13, 1898, at a valuation based upon a weighing of the various uncertainties attending the annual product of that interest and its duration, it is submitted that a lawful valuation must be less than the arithmetical "present worth" of the future payments that would result should she survive to the end of her "expectation of life" as indicated by the mortality tables, even at a reasonable rate of discount. Doubtless value may be assigned to chances, but it will scarcely be contended that the value so assigned should be the full mathematical equivalent of the proportion of the particular chance to all possible chances. In the Court of Claims, appellant undertook to prove, and her attorney considered that she had proved, among other things (1) that such interests as hers are bought and sold and (2) the amount which her interest probably would have brought if sold. The Court of Claims refused all findings upon these points, and on that account, and the refusal to find on other points considered revelant, the motions now pending were made. ***If it is considered that further proof of the value of this interest than is found in the present Record is necessary in this proceeding, appellant respectfully suggests that such proof is in the record in the Court of Claims and can be brought to this Court by remanding the proceeding for further findings in accordance with the motions heretofore made.***

As to Certiorari for Diminution of Record.

Appellant is entitled to have this Court pass upon every question of law determined adversely to her by the trial court. Certain of the findings asked for were supported by competent and uncontradicted evidence and refusal to find a matter thus supported is a proper subject for review on this appeal.

> "It is undoubtedly true, that if the Circuit Court neglects or refuses, on request, to make a finding one way or the other on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal taken in time and properly presented by a bill of exceptions may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found when in truth there was none. Both these questions of law and proper subjects for review in an appellate court." *Duncan* v. *Steamship Francis Wright, 105 U. S. 381.* See, also, *Wright* v. *Bragg, 96 Fed. 729.*

Although there has been a change in the form of the rule since the decision in *United States* v. *Driscoll, 131 U. S. appx. CLIX*, rendered on April 8, 1878, the language used by Mr. Chief Justice Waite in that case is still significant.

> "At the same time with the order for additional findings in *United States* v. *Adams, 9 Wall. 661*, and to avoid the difficulty experienced in that case, rules 4 and 5, regulating appeals from the Court of Claims, were promulgated. The fourth requires that

> Court to file its finding of facts at or before the time of entering the judgment, and the fifth permits either party to call for a finding upon a special question deemed material to the judgment in the case, and, if refused, to ask this Court to pass upon the materiality of the fact alleged, and, should it be considered material, to send down for the finding. Such is the construction given the rules in *Mahan* v. *United States*, *14 Wall. 112*. The object is to present the question here as upon an exception to the ruling of the Court below in respect to the materiality of the fact." *131 U. S Appx. CLIX.*

In *Mahan* v. *United States*, *14 Wall. 109*, this Court, speaking by Mr. Justice Miller, and with regard to the same rule, said:—

> "The remedial purpose of this rule is that when a party has, in writing, indicated a specific question of fact on which he desires the Court of Claims to make a finding, and the Court has neglected or refused to do so, this Court may be able to determine whether the question is one so necessary to the decision of the case that it will send it back for such finding" *14 Wall. 109.*

The alteration in the rule was apparently intended to simplify procedure and reduce the record in the vastly preponderating number of cases in which the findings are sufficient for all purposes on appeal, not to modify the fundamental remedial purpose or to impair the efficiency of the remedy in the relatively rare instances in which remedy is required. It never appears to have been intended that the Court of Claims should pass finally upon the materiality of any requested finding. If that Court were permitted to make such a determination the statutory right of appeal might frequently be nullified. *United States* v. *Pugh*, *99 U. S. 265.*

The effect of the writ of *certiorari* would be to complete the record on appeal to the extent that this Court will be able to ascertain therefrom, what requested findings were held to be immaterial by the Court of Claims.

This may be essential to this appeal. *United States* v. *New York Indians, 173 U. S. 464.*

Certiorari for diminution of the record is appropriate to the purpose indicated.

Morgan v. *Curtenius, 19 How. 8;*
United States v. *Gomez, 1 Wall. 690;*
United States v. *Adams, 9 Wall. 661;*
United States v. *Young, 94 U. S. 258;*
Missouri, Kansas & Texas v. *Dinsmore, 108 U. S. 30;*
American Construction Company v. *Jacksonville, Tampa & Key West Railway, 148 U. S. 372.*

As to the Motion to Remand for Additional Findings of Fact.

The present record does not contain findings of facts which may be deemed essential to a determination upon the merits. The Court of Claims decided that appellant was not entitled to recover an account of strictly technical objections. These objections were none of them raised, however, by the defendants in that Court (*R. 35; 52 Ct. Cls. 73*). Appellant contends that they are untenable. Appellant also contends that her interest was not lawfully taxed at all but, further, that if it was taxable at all it was taxable only in respect of its actual or clear value, that such value was much less than the amount in respect of which collection was made and that, therefore, the amount collected was largely in excess of that which the United States are entitled to retain. But the Court of Claims refused requests to find facts which may be thought necessary to establish real value. Uncontradicted testimony supporting such findings was disregarded and thus the trial court ruled, as matter of law, that such facts are immaterial. The questions which this Court has been asked to remand for determination upon the evidence may relate to actual or clear value.

A motion to remand for additional findings is proper in such a case and many cases have been remanded to the Court of Claims for such purposes.

Monroe v. *United States*, *37 Ct. Cls. 79;*
United States v. *Adams*, *9 Wall. 661;*
Mahan v. *United States*, *14 Wall. 109;*
Raymond v. *United States*, *92 U. S. 651;*
Ceballos & Company v. *United States*, *214 U. S. 47;*
United States v. *Archer*, *241 U. S. 119.*

Conclusion.

The judgment of the Court of Claims should be reversed.

All of which is respectfully submitted.

H. T. NEWCOMB
Attorney for Appellant

Appendix.

The statutes to be considered in connection with this appeal are:—

Act of June 13, 1898, Section 29.

The portions of section 29 material to this case are as follows:

> "SECTION 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say:
>
> "Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:
>
> . . . . . .
>
> "Fifth. Where the person or persons entitled to any beneficial interest in such property shall be . . . a stranger in blood to the person who died possessed, as aforesaid, . . . at the rate of five dollars for each and every hundred dollars of the clear value of such interest:
>
> . . . . . .
>
> "Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; . . ." *30 Stat. 448, 464-5.*

Act of June 13, 1898, Section 31.

"SECTION 31. That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed are hereby made applicable to this Act." *30 Stat. 448, 466.*

Section 3182, Revised Statutes.

"The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this Title, or accruing under any former internal-revenue act, where such taxes have not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified. . . . And all provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings herein authorized and directed." *R. S. 3182.*

Act of April 12, 1902, Section 7.

The portion of Section 7 material to this case is:—

"SECTION 7. That section . . . twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and all amendments . . . be, and the same are hereby, repealed." *32 Stat. 96.*

Act of April 12, 1902, Section 8.

The portion of Section 8 material to this case is:—

"SECTION 8. That all taxes or duties imposed by section twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this Act, shall be subject, as to lien, charge, collection, and otherwise,

to the provisions of section thirty of said Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows: . . ." *32 Stat. 96.*

Act of April 12, 1902, Section 11.

"SECTION 11. That this Act, except as otherwise specially provided for in the preceding section, shall take effect July first, nineteen hundred and two."

Section 13, Revised Statutes.

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." *R. S. 13.*

Act of June 27, 1902, Section 3.

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight upon or in respect of any contin-

gent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two." *32 Stat. 406.*

Act of July 27, 1912.

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act may be presented to the commissioner of internal revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

"SEC. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the act aforesaid." *37 Stat. 240.*

Section 3220, Revised Statutes.

(Refundment of taxes, penalties, etc.) The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty:

Provided, That where a second assessment is made in case of a list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded, or paid back, unless it is proved that said list, statement, or return was not false or fraudulent, and did not contain any understatement or undervaluation. *R. S. 3220.*

Section 3226, Revised Statutes.

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section."—*R. S. 3226.*

Section 3228, Revised Statutes.

(Claims for refundment—limitation.) All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six, eighteen hundred and seventy-two may be presented to the Commis-

sioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date. *R. S. 3228.*

Section 1069, Revised Statutes.

The portion of R. S. 1069, material to this case is:—

"Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the Court . . . . within six years after the claim first accrues: . . ."—*R. S. 1069.*

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

JENNIE LATHROP RAND, APPELLANT,
v.
THE UNITED STATES. } No. 213.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims dismissing a suit brought to recover the amount of an inheritance tax collected under the provisions of section 29 of the act of June 13, 1898, 30 Stat. 448, 464, 465, generally called the War Revenue Act of 1898.

The appellant contends that the amount claimed was illegally assessed and collected.

THE FACTS.

By section 29 of the act of June 13, 1898, a tax is imposed on legacies and distributive shares arising from personal property at certain specified rates "for each and every hundred dollars of the clear value" of the amount of the legacy subject to the tax.

On June 6, 1900, Edmund Dwight died leaving a will which gave to the New England Trust Company the sum of $125,000 in trust, to pay the income to the appellant during her life and upon her death to pay the income to her children during their lives, with remainder to Harvard College.

On the 27th of September, 1900, Elizabeth Cabot, executrix of the estate of Edmund Dwight, made a return as required by the statute, to the collector of internal revenue of $3,026.69 as the amount of tax due upon the legacy to the appellant. She determined the amount due according to certain general rules, tables, and instructions which had been promulgated by the Commissioner of Internal Revenue for use in determining the amount of tax to be paid under the revenue act. (Finding V, R. 28–33.) The tables were for the purpose of computing the present worth of an annuity, life interest, or of a reversionary interest, and were based on certain well-known mortality tables called "Combined Experienced Tables." (Finding VII, R. 33.) The rate of interest adopted for the computation was 4 per cent. It was found as a fact by the Court of Claims that the expectancies of life shown in the "Combined Experience Tables" are reasonable and slightly less than shown in other tables in general use at the time (Finding VII) and that 4 per cent was a reasonable rate at which to calculate the future earning power of invested funds. (Finding VI, R. 33.)

On the 28th day of September, 1900, Elizabeth Cabot paid the proper collector of internal revenue the sum of $3,026.69 in accordance with her return as the tax upon the legacy to the appellant. There is no evidence that the collector of internal revenue or any other officer of the United States had made any particular demand upon the executrix for the payment of this tax. The tax was paid pursuant to an agreement which had been entered into between the executrix and the appellant and her children under which the executrix agreed to pay the tax of $3,026.69 and the appellant and her children agreed to repay this amount in installments. The money paid by Elizabeth Cabot under this agreement was advanced out of the funds of the estate of Edmund Dwight. The amount of the tax has been repaid in full to the executrix. (Finding IV, R. 28.)

The executrix having died, an administrator *de bonis non, cum testamento annexo* of the estate of Edmund Dwight was appointed.

On December 24, 1913, a claim for the refund of the sum of $3,026.69 was filed with the Commissioner of Internal Revenue by the attorney for the New England Trust Company, the trustee under the will of appellant's legacy. On December 30, 1913, a like claim was filed by attorneys representing the administrator *de bonis non, cum testamento annexo* of the estate of Edmund Dwight. Both of these claims were rejected by the Commissioner of Internal Revenue on March 28, 1914. Suit was instituted by the

appellant on October 22, 1914, to recover the tax which had been paid on her legacy.

THE CONTENTIONS OF THE PARTIES.

The principal contention of the appellant is that the assessment was unlawful because

(*a*) It was made by applying a general formula based upon assumptions as to appellant's expectation of life and as to the earning power of money, and not upon a detailed inquiry into the circumstances of the particular case (Bf. 45), and there was therefore a denial of due process of law (Bf. 53).

(*b*) It was an attempt to exercise exclusively legislative power. (Bf. 41).

Both these propositions are denied by the United States.

Appellant further says that since, as she contends, there was no lawful assessment of any tax under this statute prior to its repeal nothing ever became due from her to the United States.

To this the United States replies that apart from the invalidity of the premise upon which this contention is based, liability for a tax was imposed by the statute and became effective upon the death of appellant's benefactor; and that this liability was, by reason of a specific saving clause, not affected by the statute of repeal.

Finally appellant contends, still upon the assumption that the assessment was unlawful, that if she is wrong in her contention that no tax ever became due, the case should be remanded for additional find-

ings upon which to ascertain the true state of the account.

The United States is content to leave this contention with its challenge of its premise.

But the United States further contends that appellant can not prevail:

(*a*) Because she failed to present her claim to the Commissioner of Internal Revenue and therefore does not bring herself within the act of July 27, 1912, upon which she relies.

(*b*) Because she paid the tax voluntarily.

THE ISSUES.

The principal questions to be determined are:

First.—Is appellant's suit barred because—

(*a*) There was not a proper claim presented to the Commissioner of Internal Revenue;

(*b*) There was a voluntary payment of the tax in question?

Second.—Was the method of assessment unlawful, either in that—

(*a*) It involved any denial of due process of law;

(*b*) It was unauthorized by the statute imposing the tax;

(*c*) It involved any attempt by the Commissioner to exercise exclusively legislative power?

Unless the court shall determine both of these issues adversely to the United States, the subsidiary contentions of appellant will not assume importance.

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ARGUMENT.

I.

Appellant is not entitled to bring suit for the tax alleged to have been illegally collected.

A. Her failure to present the commissioner of internal revenue a claim for repayment bars her suit.

Section 3226, Revised Statutes, prohibits the maintenance of any suit for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been made to the Commissioner of Internal Revenue and a decision of the Commissioner obtained; with the proviso that if such decision is delayed more than six months from the date of the appeal, suit may be brought without first awaiting a decision of the Commissioner. This Court has frequently held that such a failure to appeal is an effective bar to any suit like the present. (*The Collector* v. *Hubbard*, 12 Wall. 1; *Cheatham* v. *United States*, 92 U. S. 85; *Savings Institution* v. *Blair*, 116 U. S. 200; See also *Dodge* v. *Osborn*, 240 U. S. 118.)

Section 3228, Revised Statutes, requires all claims for the refunding of any internal tax alleged to have been illegally collected to be presented to the Commissioner of Internal Revenue within two years after the cause of action accrued.

Appellant seeks to avoid the bar of these sections by asserting that her case falls within the act of July 27, 1912 (37 Stat. 240). Section 1 of that act provides that claims for the refunding of taxes

alleged to have been illegally assessed or collected under section 29 of the war revenue act of 1898 may be presented to the commissioner on or before but not after January 1, 1914. But section 2 of this act authorizes and directs the Secretary of the Treasury to pay only "to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection" the amount which such claimants have paid to the United States. This last provision is the "law of Congress upon which the claim of the appellant is founded and by virtue of which the jurisdiction of the Court of Claims in this case is invoked. (See *United States* v. *Hvoslef*, 237 U. S. 1, 7.) It is necessary for the appellant to show that she has met the requirements of the act of July 27, 1912, by presenting to the Commissioner of Internal Revenue a claim for the refund of the tax which she has paid. Appellant concedes that her right to sue is dependent upon such a showing. (Brief, p. 25.)

Not having herself made a claim to the Commissioner of Internal Revenue, appellant relies upon the claim made by the trustee of the fund of which appellant was granted the income during her life, and on a claim made by the executor of the estate from which appellant's legacy was granted. Neither of these claimants purported to act in behalf of the appellant. It is sufficient to indicate that the obligation created by the relieving act of July 27, 1912, ran only to those who presented claims to the Commissioner of Internal Revenue as provided for in

section 1 of the act. The words "such claimants as have presented or shall hereafter so present *their* claims" effectively exclude those who have not presented their own claims to the Commissioner.

The cases cited by the appellant appear to have little bearing on the question here at issue. In *First National Bank of Greencastle* v. *United States*, 15 Ct. Cl. 225, it was held that the decision of the Commissioner that a claim had been properly presented to him would not be disturbed by the court in the absence of fraud or mistake. In *Wayne* v. *United States*, 26 Ct. Cl. 274, it was held that a claim which had not been presented on the proper printed form, but which had been accepted by the Commissioner and three other high executive officers of the Treasury Department, had been properly presented to the commissioner. In *Newcomber* v. *United States*, 51 Ct. Cl. 408, it was held that a claim might be presented to the Commissioner verbally.

The appellant cites several decisions of the Federal courts which hold that where a taxpayer has appealed to the Commissioner of Interanl Revenue for the review of an assessment and for the abatement of a tax, after denial of this appeal and payment of the tax, no further appeal need be made before instituting suit. The holding is that the purpose of the requirement of section 3226, R. S., and, it is contended by way of inference, that of the act of July 27, 1912, is fulfilled by the first appeal and that the law will not require the doing of what has been shown to be a useless act. It is not clear that these decisions

are sound. In *Dodge* v. *Brady*, 240 U. S. 122, 126, this court notices without adverse comment the contention made by the United States, in that case, that such is not the law.

In any event, this suit is not within the supposed rule. No prior claim of the appellant was rejected. During the period in which it was open to her to make claim to the Commissioner, nothing appears to have occurred to suggest that such appeal would be vain. Appellant says (Bf. 38) that she knew that claims of the class to which hers belonged and having precisely the same legal effect were uniformly being rejected by the Treasury Department, but nothing in the record before this court supports her statement. The Commissioner did not pass upon the appeals of third persons here relied upon until after the time for making a claim had passed. One of the claims relied upon by the appellant was made eight days, and the other two days, before the time within which claims could be made expired. The decisions rejecting the claims were made several months thereafter.

B. The payment of the tax was voluntary.

The tax for which suit is brought was paid by the executrix at the request of the appellant. The record does not show that any demand for payment had been made by any officer of the United States. (Finding IV, R. 26.) So far as appears, there was no protest or any action in any way indicative of protest against the assessment and collection of the

tax either by the executrix, the trustee, or any of the beneficiaries under the trust. (Finding IV, R. 28.) These facts bring the case within the decisions of this Court holding that taxes voluntarily paid, not under protest or with notice of intention to contest their validity, and not under duress, can not be recovered by suit against the United States. (*United States* v. *Edmonston*, 181 U. S. 500; *Cheeseborough* v. *United States*, 192 U. S. 253.)

Except for *United States* v. *Hvoslef*, 237 U. S. 1, it would probably not be contended that the act of July 17, 1912, affected the application of this rule. The Hvoslef case was a suit to recover a stamp tax imposed by the war revenue act of 1898 and paid on charter parties for the carriage of export cargoes. The tax had been paid without protest, but the plaintiff had presented a claim to the Commissioner of Internal Revenue for a return of the tax. This Court allowed the recovery on the ground that the tax was an unconstitutional tax on exports and that the act of July 27, 1912, created an obligation which arose whether or not the tax had been voluntarily paid.

The learned judge speaking for the Court of Claims in this case pointed out that *United States* v. *Hvoslef* must be read in the light of certain prior decisions and statutes. He referred to the authorities holding unconstitutional various forms of taxes on exports imposed by the war revenue act. He noted the statutes following these decisions authorizing repayment of taxes on exports without regard to protest.

His conclusion was that the decision in the Hvoslef case that protest is unnecessary in suits based upon the act of July 27, 1912, only applied to suits to recover unconstitutional taxes on exports.

The appellant, in any event, faces a serious dilemma. If she bases her suit on the act of July 27, 1912, she fails because she has not presented her claim to the Commissioner, as the act requires. If she contends that her suit is not dependent on that act, she fails because no protest accompanied the payment of her tax.

II.

The tax upon appellant's life interest was lawfully assessed.

A. Assessment of appellant's life interest by the application of a general rule was not a violation of the fifth amendment.

The case of *Knowlton* v. *Moore*, 178 U. S. 41, squarely decided that the inheritance tax levied by the war-revenue act of 1898 was not a tax on property, but a tax on a right or privilege, in the nature of an excise tax.

An excise tax, not being as such a tax on value, may be fixed according to general measure or standard. The most that is required is that the standard have a reasonable relation to value. Cases sustaining such assessments are very numerous. In the taxation of corporate privileges this court has sustained a tax upon the average gross receipts per mile multiplied by the number of miles within the taxing

jurisdiction (*Maine* v. *Grand Trunk Railway*, 142 U. S. 217), a tax determined by the amount of dividends made and declared (*Home Insurance Company* v. *New York*, 134 U. S. 594), and a tax based on the number of miles of telegraph lines within the taxing jurisdiction (*Postal Telegraph Company* v. *Adams*, 155 U. S. 688).

Since there is no inherent necessity for accurate ascertainment of value in a succession tax, appellant is driven to reliance upon the language of section 29 that the tax shall be on "clear value." This, in effect, is conceded by her. For her statement of her contention on this point is that the fifth amendment guarantees to those on whose property "an *ad valorem* tax" is laid, the right to have that value ascertained by a quasi judicial inquiry. (Bf. 53.) The right claimed is said, therefore, to grow out of the language of the statute. The result is that in truth the question raised is merely one of statutory construction and not one of constitutional law. The question of construction presented will be dealt with in a moment.

Even were a constitutional question raised, there has been no want of due process. The requirements of due process with respect to taxation were admirably stated by Justice Field in *Hagar* v. *Reclamation District*, 111 U. S. 701, 708, as follows:

> It is sufficient to observe here, that by "due process" is meant one which, following the forms of law, is appropriate to the case and

> just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be obtained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the judgment sought.

Now the value of physical property other than money can not ordinarily be arrived at by the application of fixed rules or mathematical calculations. That is a reason why, under certain State constitutions laws attempting to tax physical property upon the basis of some arbitrary measure or standard have been held unconstitutional as violating specific requirements of the Organic Act other than the limitation of "due process" contained in the Federal Constitution. The cases cited by the appellant on pages 54 and 55 of her brief are of this nature. But these decisions have no application to this case. In cases like this, general rules furnish the most accurate available measure of value, are in every sense appropriate and are altogether just.

It is a matter of common knowledge that calculations of value which involve the expectancy of life or the present value of obligations to pay money in the future are made in the commercial world upon the basis of mortality tables and fixed rates of interest. Many statutes imposing succession taxes require life interests and annuities to be valued in

this way. The following statutes containing this feature have been in force many years:

New York Laws of 1892, c. 399, as amended by the laws of 1895, c. 556.
Maine Laws of 1895, c. 146, as amended by the laws of 1895, c. 96.
Ohio Laws of 1894, c. 166.
Connecticut Laws of 1889, c. CLXXX.
California Laws of 1893, c. CLXVIII, as amended by the laws of 1895, c. XXVIII.
Massachusetts Laws of 1891, c. 425.

This method of assessment has been recognized as valid in numerous court decisions:

People v. *Trust Company*, 266 Ill. 139.
Howe v. *Howe*, 179 Mass. 546.
State v. *Probate Court*, 136 Minn. 392.
In re Tracy, 179 N. Y. 501.
In re White, 208 N. Y. 64.
Crenshaw v. *Knight*, 127 Tenn. 708.
In re Cornwallis, 11 Ex. 580.

The general use made of these methods of assessment is the most convincing proof possible that they are appropriate, just, and adapted to the ends sought, namely, the ascertainment of the value of a life interest in income. Assessment made according to such methods is due process of law.

B. The method of assessment employed, namely, the use of mortality tables and an assumed rate of interest was authorized by the war revenue act of 1898.

Under the provisions of section 321, R. S. (made applicable by section 31 of the war revenue act) the general superintendence of the assessment and col-

lection of appellant's tax devolved upon the Commissioner of Internal Revenue.

As early as December 16, 1898, the commissioner promulgated the general rules set forth in Finding V (R. 28 to 33) for the purpose of valuing life interests and annuities. This construction primarily adopted in the enforcement of the act was followed without deviation during the existence of the law and has been consistently maintained by the executive officers. This is sufficiently shown by the references in the cases about to be cited.

This Court has approved the interpretation placed upon the law by the Commissioner of Internal Revenue.

Knowlton v. *Moore*, 178 U. S. 41, concerned the validity of a succession tax imposed under the authority of section 29 of the war revenue act of 1898. Included in the legacy subject to tax was a life interest the value of which was assessed by the collector "according to United States tables" (p. 44). While the method of assessment was not directly attacked in that case, it was laid before this Court and received no unfavorable comment.

Facts precisely like those here were passed upon by this Court in *United States* v. *Fidelity Trust Company*, 222 U. S. 158. The testator had died leaving his residuary estate in trust to pay over the income to his niece during her life. The opinion of Mr. Justice Holmes states that the value of this life interest was appraised "with the aid of mortality tables, the rate of interest being assumed to be 4 per cent" and an

inheritance tax upon this value was assessed and paid.

A statute was passed remitting the tax imposed by the act now in question so far as it was applicable to beneficial interests which had not vested prior to July 1, 1902. It was contended, as is shown by the briefs, that Congress meant to tax life interests only to the extent of payments as they became due to the beneficiary, and in support of this contention it was urged that the method (there as here) employed for ascertaining the clear value of such interests was improper. Indeed the argument rested upon the contention that no effective method of ascertaining such clear value, in advance of the actual payment of the income, could be found. In holding that the tax assessed in 1900 upon the life estate valued as was that here was properly collected and was unaffected by the relieving statute, this court necessarily gave its approval to the method of assessment.

It may be said that the decision just mentioned disposes likewise of appellant's contention that the statute here did not sanction a tax which could not be deducted from something immediately payable. (Bf. 65–70.) Such a contention is also wholly irreconcilable with the rule that a succession tax is imposed as of the moment of the benefactor's death. (*Hertz* v. *Woodman*, 218 U. S. 205.)

The appellant is asking this Court to deduce from nothing more than the use of the words "clear value," found in section 29, the proposition that value in these cases can not be determined by general rules.

The words themselves do not warrant this deduction; ordinary business custom is against it; administrative construction has been contrary to it; and the decisions of this Court do not sustain it.

C. Fixing a given rate of interest as the earning power of money for purposes of tax assessment is not an unlawful attempt to exercise legislative power.

In order to assess the present value of a right to receive money in the future it is necessary to determine the interest which money will earn and to apply this as a rate of discount. Determining the earning power of money is, then, simply a step in the process of valuation.

Assessment of property for purposes of taxation can not ordinarily be undertaken by the legislature. It may be that in cases like this in which all assessments are affected by the same factor—*e. g.*, the rate of discount, the legislature could conveniently prescribe a rule. But such actual power to act does not transform what is properly an administrative matter into an exclusively legislative function.

In the war revenue act Congress fixed the rates of taxation and left to the Commissioner of Internal Revenue the process of applying them. The most that can be said of this is that it is an example of the familiar right "to leave to executive officials the duty of bringing about the result pointed out by the statute." (*Buttfield* v. *Stranahan*, 192 U. S. 470, 496.) If Congress has outlined the purpose and

scope of legislation it can leave to administrative officials the power to make regulations to carry it into effect. (*United States* v. *Grimaud*, 220 U. S. 506; *United States* v. *Antikamnia Company*, 231 U. S. 654.)

III.

In any event appellant is not entitled to recover all that she has paid.

A final point made by appellant may be noticed briefly, although it is deemed immaterial in view of what has been said. That is, her claim that she is entitled to recover all that was paid. This contention is based upon the following reasoning. The act of April 12, 1902 (32 Stat. 96) repealed section 29 of the war revenue act, except as to taxes "imposed" before the repeal. Since, as it is said, the assessment was illegal, this tax was not "imposed."

There is here a *non sequitur*. The tax was imposed when the liability accrued. The liability accrued when the testator died. This was squarely decided by this court in *Hertz* v. *Woodman*, 218 U. S. 205, 220. The most which appellant can recover is the difference between what she paid and what she owed. The absence of a counter claim on behalf of the United States does not affect this result. (*Wisconsin Central Railroad* v. *United States*, 164 U. S. 190, 212.)

CONCLUSION.

But the appellant paid only what, under a perfectly lawful assessment, she in fact owed.

The judgment of the Court of Claims should be affirmed.

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Assistant Attorney General.
Charles H. Weston,
Attorney.

March, 1919.

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